TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 90

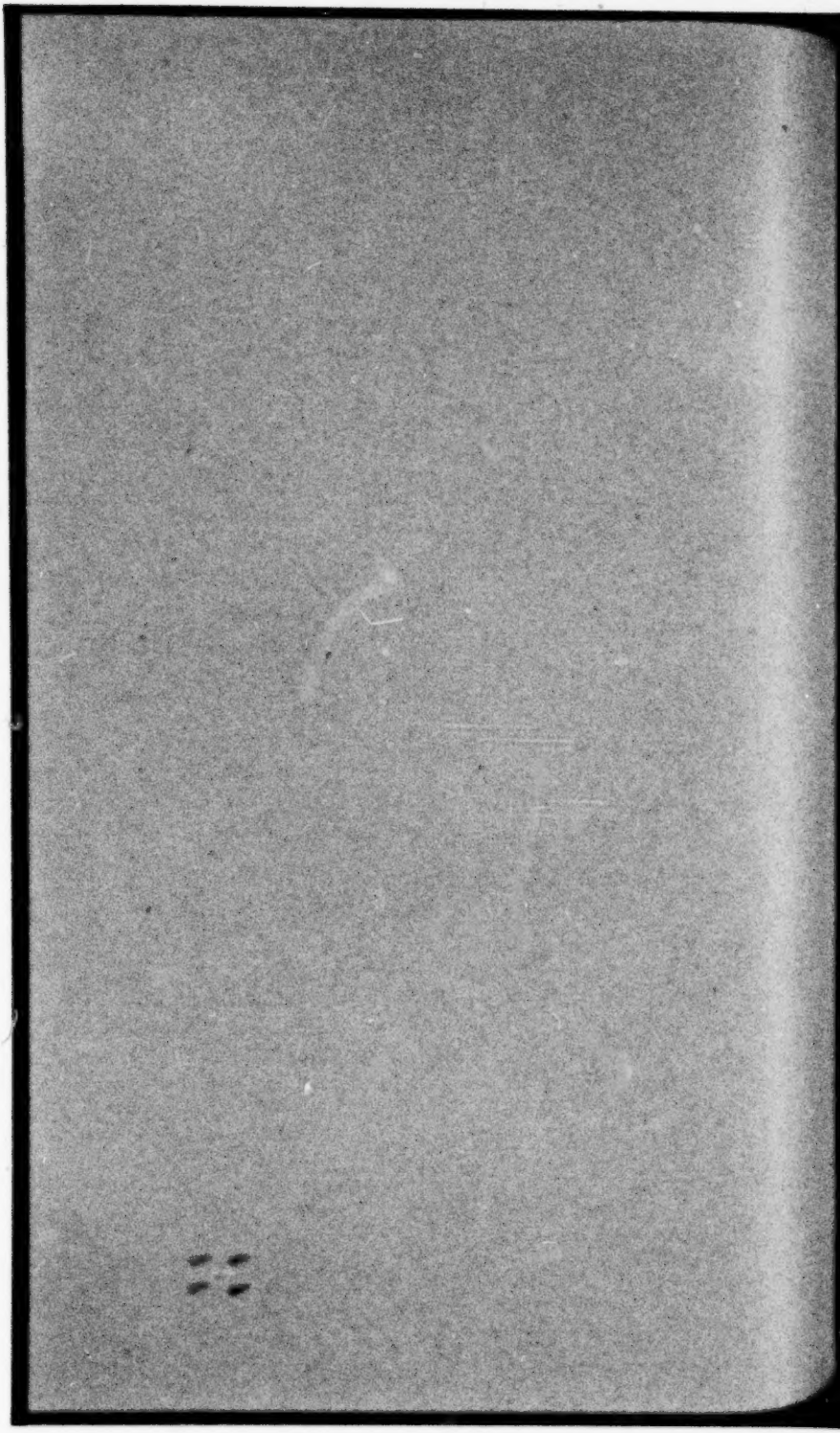
MABEL G. REINECKE, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF ILLINOIS, PETITIONER

vs.

THE NORTHERN TRUST COMPANY, AS EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF A. C. BARTLETT, DECEASED

IN WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 10, 1928
CERTIORARI GRANTED APRIL 23, 1928



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[Caption omitted.]

[Præcipe for summons; omitted in printing.]

[Summons and marshal's return; omitted in printing.]

In United States District Court

Declaration

Filed May 12, 1925

The Northern Trust Company, as executor under the last will and testament of Adolphus C. Bartlett, deceased, by Wilson, McIlvaine, Hale & Templeton, its attorneys, complains of Mabel G. Reinecke, as collector of internal revenue of the United States of America, for the first district of the State of Illinois, defendant in this case, summoned of a plea of trespass on the case on promises.

First Count

For that whereas the plaintiff alleges:

1. That it is, and was during all of the times hereinafter mentioned, a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, and a resident and citizen of the State of Illinois, having its principal place of business in the city of Chicago, in the State of Illinois, and in the said first internal-revenue district of the State of Illinois.

2. That the defendant at the times more specifically mentioned was, and now is, a resident of the city of Chicago, in the State of Illinois, for the Northern District of Illinois, in the Eastern Division thereof, and the duly appointed and qualified United States collector of internal revenue for the first district of the State of Illinois.

3. That this suit is of a civil nature, and arose under and by virtue of the Constitution and laws of the United States of America, and the amount involved in this controversy exceeds, exclusive of interests and costs, the sum of $3,000.

4. That Adolphus C. Bartlett died testate on the 30th day of May, 1922, a citizen of the United States and of the State of Illinois, and a resident of the city of Chicago, in the county of Cook and State of Illinois, and the first internal-revenue district of the State of Illinois.

5. That the last will and testament of Adolphus C. Bartlett, bearing date the 1st day of March, 1919, together with the codicil thereto, bearing date the 18th of March, 1921, was thereafter on, to wit, the 22d day of July, 1922, duly admitted to probate in the probate court of Cook County, Illinois.

6. That by the terms of the said last will and testament the said testator, in paragraph 19 thereof, constituted and appointed the

plaintiff herein, the Northern Trust Company, of Chicago, Illinois, executor of the said last will and testament.

7. That on, to wit, the 22d day of July, 1922, letters testamentary were duly issued by the said probate court of Cook County to the plaintiff, the Northern Trust Company, as executor under the said last will and testament of Adolphus C. Bartlett, deceased, and the plaintiff, the Northern Trust Company, thereupon duly qualified as such executor, and is now acting in such capacity, and said letters testamentary are still in full force and effect.

8. That on or about the 29th day of May, 1923, the plaintiff herein, as executor of the estate of Adolphus C. Bartlett, deceased, in accordance with the requirements of the estate-tax law, being Title IV of the revenue act of 1921, and approved and in force November 23, 1921, and pursuant to the regulations of the Treasury Department and the Commissioner of Internal Revenue of the United States in that respect, filed its estate-tax return, setting forth the assets of the said estate in the hands of the plaintiff as such executor.

9. That the said return was filed in the office of the defendant herein, Mabel G. Reinecke, as the collector of internal revenue of the United States for the first district of Illinois, at Chicago, Illinois.

10. That a tax of $225,407.01 upon the net value of the said estate of Adolphus C. Bartlett, so shown by said return, was assessed, and thereupon paid by the plaintiff as executor as aforesaid to the said Mabel G. Reinecke, collector as aforesaid, on, to wit, the 29th day of May, 1923.

11. That the revenue act of 1921, heretofore referred to, imposed a tax upon a decedent's net estate, which was to be determined by deducting from the decedent's gross estate certain allowances provided for in the statute.

And it further provided as follows:

"Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

"(a) * * *

"(b) * * *

6 "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title."

12. That the said Adolphus C. Bartlett during his lifetime, and on or about the 1st day of March, 1919, and in and by a certain

indenture of trust bearing the said date, transferred and conveyed to the Northern Trust Company, a corporation authorized to accept and execute trusts under the laws of the State of Illinois, and having its principal place of business in the city of Chicago, county of Cook, and State of Illinois, as trustee, certain properties more specifically described in the said instrument. The said indenture of trust, for the purposes of identification, bears the number of the Northern Trust Company, No. 4477, and was in words and figures as follows:

This indenture, made this first day of March, in the year of our Lord one thousand nine hundred and nineteen (A. D. 1919), by and between Adolphus C. Bartlett, of the city of Chicago, county of Cook, and State of Illinois, the party of the first part, and the Northern Trust Company (hereinafter termed the "trustee"), of Chicago, a corporation organized and doing business under the laws of the State of Illinois, the party of the second part, witnesseth:

Article First

That the party of the first part, being desirous of establishing and creating the trust hereinafter mentioned, for the purposes and upon the terms set forth, in consideration of the premises and influenced by love and affection for the beneficiaries hereinafter named, does hereby sell, assign, transfer, and set over unto the trustee the following securities, to wit:

1,000 shares of the stock of the Northern Trust Company.
784 shares of the stock of the Commonwealth Edison Company.
300 shares of the stock of the Illinois Central Railroad Company.
300 shares of the common stock of the Chicago & Northwestern Railroad Company.
200 shares of the preferred stock of the Chicago & Northwestern Railroad Company.
100 shares of the stock of the Pullman Company.
5 bonds of Armour & Company, for $1,000 each.
15 bonds of Morris & Company, for $1,000 each.

Also the following-described notes secured by mortgage on real estate in Phoenix, Arizona:

Maker	Amount
Rollin S. Howard	5,000 00
W. S. Herman	5,000 00
Edgar O. Fawcett	22,500 00
Elisha T. Waters	5,000 00
Roy S. Goodrich	40,000 00
Wilson W. Dobson	7,000 00
Rodwell Music Company	20,000 00
Pauline M. O'Neil	25,000 00
Pauline M. O'Neil	5,000 00

to be held and disposed of under and in pursuance of this indenture.

Article Second

The trustee shall have power and authority at any time, and from time to time—

(1) To receive and collect all dividends declared and paid upon any shares of stock at any time subject to the terms of this agreement, and the interest upon all moneys, bonds, and obligations at any time held by it hereunder, and also all rents and other income which shall accrue or become due and payable on or from any of the trust estate hereunder.

(2) To sell, transfer, assign, and convey any or all of the stocks, bonds, obligations, securities, real estate, or other property held at any time by said trustee under this instrument, and to invest and reinvest the proceeds thereof in either real or personal property, including dividend-paying stocks of corporations; provided, however, that during the life of said party of the first part said trustee shall be governed by any instructions or directions in writing given to it by said party of the first part in regard to the management, sale, or investment of any part of the said trust estate, and said trustee shall be free from any liability or responsibility for any action by it done under or in pursuance of any such written direction or instruction. In no event shall any purchaser from the trustee, or any person or corporation dealing with the trustee, be required to ascertain the authority and power of the trustee to make any sale, conveyance, or transfer of any part of the trust estate held hereunder, but every such purchaser and all other parties shall be entitled to rely upon the delivery of the transfer, assignment, or conveyance by the trustee of any or all of said trust estate as having been in all respects fully authorized, and shall not be affected by any notice to the contrary, or be required to see to the application of the purchase money.

(3) To exercise the voting power upon all shares of stock held by the trustee hereunder, and to exercise every power, election, and discretion, give every notice, make every demand, and do every act and thing in respect of any shares of stock or bonds, or other obligations and securities held by the trustee hereunder, which it might or could do if it were the absolute owner thereof; provided, however, that upon the written request of said first party it shall be the duty of the trustee to execute, or cause to be executed, to the person or persons named in such requests a proxy, entitling him or them (with full power of substitution) to vote in respect of any shares of stock in such written request or proxy defined and mentioned, at any meeting or meetings of the stockholders of any corporation or corporations specified in such request and proxy.

(4) To receive any and all stock dividends declared, and any other distribution which may be made by any corporation, any of whose shares of stock at the time constitute a part of the principal of the trust estate, and also all proceeds which may be paid on or in respect

of any such shares of stock on the liquidation of the company issuing the same, or upon the sale (whether voluntary or involuntary) of its assets, or any part thereof, or which may be otherwise paid out of capital or on account of the principal of any bond, stock, or other security; and may in its discretion join in any plan of reorganization or of readjustment of any corporation, any of whose shares of stock, bonds, or other securities or obligations may at any time
9 constitute a part of the principal of the trust estate, and accept the substituted securities in and by said plan allotted in respect to the securities and obligations so held by the trustee.

(5) To execute leases of any real estate which shall form a part of the said trust at any time, at such rental, and upon such terms, and for such length of time (not exceeding two hundred (200) years) as it may deem best; to erect buildings, or to change, alter, or make additions to any existing buildings upon any real estate which may form a part of said trust estate; and to do all other acts in relation to the said real estate which in the judgment of said trustee shall be needful or desirable to the proper and advantageous management thereof, so as to protect the same and make the same productive; provided, however, that in every case the said trustee shall observe and be governed by any instructions or requests in relation thereto made by an instrument in writing, signed by said first party.

Article Third—Distribution and application of income

(1) During the joint lives of the said party of the first part and his wife, Abby H. Bartlett, the said trustee shall pay to the said Abby H. Bartlett the sum of two thousand dollars ($2,000.00) on the last day of each month, and the residue of said net income shall be accumulated in the hands of the said trustee and kept invested in the same manner as said trustee is authorized to invest the principal of said trust.

The said payments to the said Abby H. Bartlett are in lieu of the monthly payments now being made to her under an existing agreements, and not in addition thereto.

(2) From and after the death of the said party of the first part, the said payment of two thousand dollars ($2,000.00) in each month shall continue to be made to the said Abby H. Bartlett, until she shall either die or become entitled to a share of said first party's estate otherwise than under his will, bearing even date herewith; and the residue of said net income shall in each year be paid by said trustee to the four (4) children of said party of the first part, viz, Maie Bartlett Heard, Frederic Clay Bartlett, Florence Dibell Bartlett, and Eleanor Bartlett Perdue, or the survivors of them, in equal shares; provided, however, that in the event of the death of either of said children of said party of the first part leaving
10 issue surviving, such surviving issue shall stand in the place of such deceased child and receive the share of said net income which such deceased child would have received if living; it

being the intention of said party of the first part that all payments to his wife, Abbey H. Bartlett, under this trust shall cease and be at an end upon her becoming entitled to any share or portion of his estate otherwise than under his will, bearing even date herewith, and that, subject to the payments hereinbefore directed to be made to said Abby H. Bartlett, the net income of said trust estate shall be paid to the children of said party of the first part (and the issue of any deceased child) in the shares above specified during the continuance of the trust hereby created.

Article Fourth—Distribution of principal of trust estate

The trust hereby created shall terminate at the expiration of five (5) years from the death of the party of the first part unless the said Abby H. Bartlett shall then be living and be entitled to receive monthly payments out of the net income of said trust estate under the provisions of this indenture, in which case this trust shall continue until the death of said Abby H. Bartlett, and shall then terminate.

Upon the termination or expiration of the trust hereby created, the trust estate then in the hands of said trustee shall be paid over and distributed as follows:

(a) One-fourth (1/4) thereof to each of the four (4) children of said party of the first part hereinbefore named, viz, Mabe Bartlett Heard, Frederic Clay Bartlett, Florence Dibell Bartlett, and Eleanor Bartlett Perdue;

(b) If either of said four (4) children shall not then be living, his or her one-fourth (1/4) of said trust estate shall be paid over and distributed to the then surviving issue of such deceased child per stirpes; and in default of such surviving issue, then to the surviving issue of said party of the first part per stirpes.

Article Fifth—Concerning the trustee

The trustee hereby accepts the trust created by this indenture, and agrees to act in accordance with its terms and provisions.

11 The trustee may consult with counsel and shall be fully protected in any action or nonaction taken, permitted or suffered by it in good faith and in accordance with the opinion of counsel selected or provided by it; and in case of legal proceedings involving the trustee or the principal of the trust estate, the trustee may defend such proceedings or may, upon being advised by such counsel that such action is necessary or advisable for the protection of the interests of the trustee, or of the beneficiaries, institute any legal proceedings.

The trustee shall be reimbursed and indemnified against any and all liability, loss, or expense because of the holding of any shares of stock or other properties constituting a part of the principal of the trust estate, either in its own name or in the name of a nominee, and shall have a lien upon the principal of the trust estate and the income therefrom for the amount of any liability, loss, or expense which may

be so incurred by it, including the expense of defending any action or proceeding instituted against it or such nominee by reason of any such holding.

Out of the income of the principal of the trust estate the trustee shall pay all taxes, assessments, or other governmental charges which it may be required to pay or to retain because or in respect of any part of the principal of the trust estate or the income therefrom or the interest of the trustee therein, or the interest of any beneficiary or other person therein, under any present or future law of the United States, or of any State, county, municipality, or other taxing authority therein, any and all such taxes, assessments, or other governmental charges lawfully imposed being charged as a lien upon the said income, and in case of deficiency of said income upon the principal of the trust estate.

All payments or distribution of income to beneficiaries in this indenture provided for shall be made out of net income, current or accumulated, then in the hands of the trustee.

The said trustee, or any successor in trust, may resign at any time by giving notice in writing of such resignation to said first party while he shall live, and after his death by giving notice in writing of such resignation to either one of the beneficiaries hereinbefore named.

In case of the resignation of any trustee acting hereunder, or of its disability or incapacity to further act as trustee, the said party of the first part, if living, and after his death a majority of the five (5) beneficiaries hereinbefore named, viz, the wife and four
12 (4) children of said party of the first part, or a majority of the survivors of them, shall have power to appoint a successor in trust by an instrument in writing duly signed by him or them and delivered to said trustee, and upon the appointment of such successor in trust the said trustee shall convey, assign, transfer, and deliver to such successor in trust all of the trust estate then in its hands, and thereupon and thereafter such successor in trust shall have all the rights, powers, duties, and authority which are granted to or imposed on said original trustee under the provisions of this indenture.

Article Sixth—Miscellaneous provisions

(1) Said grantor has created the foregoing trusts to provide for the support and maintenance of the beneficiaries entitled to share in the income of said trust estate, and the said beneficiaries shall have no power to anticipate, assign, or otherwise dispose of or encumber their respective interests in said trust estate, and the same shall not be subject to be taken from them by process of law.

(2) Any of the provisions of this trust deed may be altered, changed, or modified in any respect and to any extent at any time during the life of said party of the first part by the delivery to said trustee of an instrument in writing signed by said party of the first part and by a majority of the five (5) beneficiaries hereinbefore named, or by a majority of the survivors of said five beneficiaries.

(3) The beneficiaries, or any or either of them, may act through an attorney in fact in signing any and all instruments delivered to the trustee under this indenture, with like effect as though signed in person, and any or either of said beneficiaries may act as such attorney in fact when authorized so to do.

In witness whereof the parties hereto have executed this instrument, under seal, the day and year first above written.

ADOLPHUS C. BARTLETT. [SEAL.]
THE NORTHERN TRUST COMPANY,
By SOLOMON A. SMITH, *President.*

Attest:
H. H. ROCKWELL,
Assistant Secretary.

13. That at the time of the execution and delivery of the said
13 indenture of trust, and the property therein listed, the said Adolphus C. Bartlett was in good health, and suffering from no physical disability, and the said conveyance and transfer and trust indenture was not made by the said Adolphus C. Bartlett in contemplation of his death.

14. That the said trust indenture and conveyance aforesaid was not, by the terms of the said trust indenture, or in fact, intended by the said Adolphus C. Bartlett, to take effect in possession or enjoyment at or after his death. But the said conveyance was intended to, and did in fact, take effect in possession and enjoyment, and vest immediately upon the date of the said instrument.

15. That the said grantor reserved to himself no beneficial interest in the property conveyed by the said instrument.

16. That the said grantor did not, during his lifetime, and subsequent to the execution and delivery of the said trust indenture on the date it bears, exercise any dominion, power or control over the property conveyed by the said trust indenture as aforesaid.

17. That the plaintiff in filing its said estate-tax return, as aforesaid, did not include in its computation of the gross value of the said estate the value of any of the properties conveyed as aforesaid to the Northern Trust Company as trustee under the said indenture above set out; but did, however, in the said return make a full and complete disclosure of the facts surrounding the said transfer as evidenced by the said indenture of trust, and accompanied its return by its statement in writing explaining its reasons for not including the value of the property so conveyed in the gross estate of the said decedent, to wit, that the said transfer was not made by the decedent in contemplation of or intended to take effect in possession or enjoyment at or after his death.

18. That thereafter the Commissioner of Internal Revenue conducted an investigation of the said return of the plaintiff as said executor, of the value of the net estate of Adolphus C. Bartlett, deceased, and the value of the properties conveyed as aforesaid, covered by the said trust indenture above referred to, and bearing date

the 1st day of March, 1919, and fixed and determined the value of the properties so conveyed by the said trust indenture in the sum of $718,112.29, included the same in the computation of the gross estate of the decedent, and thereby, by a like amount, increased the value of the net estate of the said Adolphus C. Bartlett, deceased, for the purpose of the assessment of the so-called estate tax.

14 19. That thereupon the said Commissioner of Internal Revenue, on or about the 1st day of May, 1924, did assess an additional tax, computed on the inclusion in the gross estate of the decedent of the above mentioned value of the properties above referred to, and also the value of certain other properties elsewhere referred to; which additional tax as assessed on all such properties amounted to the sum of $314,993.93, of which total amount the sum of $129,260.21 represented the additional tax assessed as the result of the inclusion in the gross estate of the decedent of the properties referred to and conveyed by the said trust indenture.

20. And the said Commissioner of Internal Revenue did, on or about the 12th day of May, 1924, by a letter bearing date May 1, 1924, demand of the plaintiff as executor of the estate of Adolphus C. Bartlett, deceased, that it pay the said additional tax of $314,993.93.

21. The said notice of the said Commissioner of Internal Revenue, concerning the said additional assessment and demand for payment, was in words and figures as follows:

MAY 1, 1924.

ET—MT—3481—LO.
District of First Illinois.
Estate of Adolphus C. Bartlett.
Tax liability, $314,993.93.

The NORTHERN TRUST COMPANY,
Executor, Estate of Adolphus C. Bartlett,
Care of Collector,
Chicago, Illinois.

SIRS: A review and audit of the return on Form 706 filed for this estate and of the report of investigation discloses a total tax liability of $540,400.94. The return shows a tax liability of $225,407.01, which has been paid. The amount due is $314,993.93, which should be paid to the collector of internal revenue at Chicago, Illinois, without delay, as section 407 of the revenue act provides that the excess part of the tax shall bear interest at the rate of ten per centum per annum from the expiration of one month after the date of the receipt of this letter until payment is received by the collector.

On the second sheet of this communication is a complete summary of the returned and determined values placed upon the property and also the claimed and allowed deductions. Following the summary is an explanation of the changes made.

2—Estate of Adolphus C. Bartlett.
Date of death, May 30, 1922.

15 *Summary*

	Returned (706)	Determined on review
Gross estate		
Real estate	$319,841.01	$319,841.01
Stocks and bonds	1,942,991.82	2,021,272.18
Mortgages, notes, cash, and insurance	281,971.00	290,363.32
Other miscellaneous property	33,656.01	37,656.01
Transfers	148,294.02	2,059,735.26
Powers of appointment		
Property identified or taxed within five years		
Total gross estate	2,726,254.26	4,729,908.78
Deductions		
Funeral expenses	1,308.00	1,308.00
Administration expenses		
Executor's fee	42,000.00	42,000.00
Attorney's fee	28,000.00	28,000.00
Miscellaneous	10,147.74	10,147.74
Debts of decedent	25,915.19	25,915.19
Unpaid mortgages		
Net losses during settlement		
Support of dependents	50,000.00	50,000.00
Property identified or taxed within five years		
Charitable, public, and similar bequests	62,000.00	62,000.00
Specific exemption (resident decedents only)	50,000.00	50,000.00
Total	270,409.93	270,409.93
Net estate for tax	2,455,744.33	4,459,338.85
Total tax	297,687.01	540,605.00
Additional tax due		319,066.82

3—Estate of Adolphus C. Bartlett.

The changes indicated below show the specific adjustments, as determined by this bureau, in accordance with the estate tax law.

16	Returned	Determined
GROSS ESTATE		
Stocks and bonds		
1,200 shares Allied Paper Mills preferred	$81,250.00	$81,943.75
1,440 shares Allied Paper Mills, common	1,440.00	12,825.00
50 shares Arizona Publishing Company	5,000.00	7,500.00
1,000 shares Bartlett Heard Land and Cattle Co.	275,000.00	330,000.00
200 shares Cananea and Arizona Mining Company	12,500.00	12,500.00
100 shares Chicago and Northwestern Railway Co.	7,000.00	7,125.00
1,920 shares Elgin National Watch Company	74,880.00	79,968.00
375 shares First National Bank of Chicago, Ill.	150,000.00	150,000.00
2,450 shares Hibbard, Spencer, Bartlett and Company	408,900.00	511,434.00
200 shares Illinois Central Railroad Company	21,200.00	21,350.00
931 shares International Harvester Company	86,940.00	86,709.00
2,450 shares Standard Paper Company, common	78,960.00	63,278.00
50 shares Chicago Auditorium Association	0.00	250.00
$85,000 U. S. first Liberty loan, 3½%	84,943.00	84,981.00
4—Estate of Adolphus C. Bartlett		
Stocks and bonds—Continued		
$40,000 U. S. second Liberty loan 4¼%	39,944.00	39,968.00
$15,000 U. S. fourth Liberty loan 4¼%	14,971.00	14,982.00
$3,000 U. S. four & 1 Liberty loan 4¼%	2,970.00	2,988.00
$4,000 U. S. fourth Liberty loan 4¼%	99.00	99.00
$5,000 U. S. victory loan 4¾%	15,000.00	15,000.00
$1,000 war saving certificates	975.00	975.00
17 Mortgages, notes, cash, and insurance		
Loan [illegible] upon promissory note, in the state of Illinois	0.00	1,000.00
Policy No. 60000, Mutual Benefit Life Insurance Company	0.00	1,000.00
Accumulated dividends	2,971.00	4,392.00
Other miscellaneous property. Furniture loaned to Art Institute	0.00	4,000.00
Transfers. The value of the following described property transferred by decedent in his lifetime or intended to be given effect to during [illegible] deceased after consideration of all the facts that such transfers are taxable under the provisions of the Federal estate-tax law		

	Returned	Determined
GROSS ESTATE—continued		
5—Estate of Adolphus C. Bartlett		
Transfers—Continued		
Items under trust agreement No. 4479—		
Item 1—200 shares Chicago and Northwestern Railway Co	$0.00	$15,250.00
Item 8—$7,100 U. S. third Liberty loan bonds	0.00	7,092.90
Item 9—$17,000 U. S. Liberty loan bonds, 4¼%	0.00	16,994.90
Item 10—4,000 U. S. Victory loan 3¾%	0.00	4,024.80
Sum of items unchanged as disclosed in the return under trust agreement No. 4479	0.00	259,129.83
Items under trust agreement No. 4478—		
Item 34—300 shares Chicago and Northwestern Railway Co., common	0.00	22,875.00
18 Item 36—$8,000 city of Chicago 4%	0.00	7,824.00
Sum of items unchanged as disclosed in the return under trust agreement No. 4478	0.00	263,036.32
Items under trust agreement No. 4477—		
Item 45—300 shares Chicago and Northwestern Railway Co., common	0.00	22,875.00
Sum of items unchanged as disclosed in the return under trust agreement No. 4477	0.00	664,938.90
Surplus income over and above annuity of $24,000 to decedent's wife	0.00	30,298.39
6—Estate of Adolphus C. Bartlett		
Transfers—Continued		
Sum of items unchanged as disclosed in the return under trust agreement No. 4480	0.00	249,731.29
Sum of items unchanged as disclosed in the return under trust agreement No. 4481	0.00	207,350.04
Difference between net estate, returned and determined, to balance	1,982,574.23	

In determining the tax liability of the estate, due consideration has been given the briefs and papers submitted by the attorneys for the estate with their letter of April 23, 1924.

This letter shows the bureau's determination of the estate tax liability of this estate, and assessment will be made on this basis. All questions relating to the discharge of this tax should be taken up direct with the collector and not with this office.

Respectfully,

(Signed) R. M. ESTES,
Deputy Commissioner.

BGC.

19 22. That thereafter on, to wit, the 28th day of May, 1924, the plaintiff paid to the defendant the sum of $45,398, and on, to wit, the 10th day of June, 1924, the plaintiff paid to the defendant the sum of $269,595.93, the total of which payments amounted to the sum of $314,993.93, and both of which payments were made because of the additional assessment above referred to, and solely to avoid the imposition of interest and penalties visited for failure to pay said tax, and to avoid prosecution and distraint in the sale of the property of the said estate, and under compusion, duress, and coercion. That the said payments were made under protest in writing, by the plaintiff, that no tax was due from it based on the inclusion within the estate of the value of said property conveyed as aforesaid, and that the defendant was without authority to exact the same.

23. That in the aforementioned total payment of $314,993.93, made under protest by the plaintiff to the defendant, there was included in the above-mentioned sum assessed by reason of the inclusion in the

gross estate of the decedent of the properties, or sums above referred to.

24. That thereafter, to wit, on the 30th day of July, 1924, in accordance with, and in the manner and form as provided in section 3226 of the Revised Statutes of the United States, the provisions of the law in that regard, and the regulations of the Secretary of the Treasury, and of the Commissioner of Internal Revenue established in pursuance of said law, the plaintiff filed with the defendant herein and with the said Commissioner of Internal Revenue its claim for a refund of the said tax illegally assessed and paid, in the amount of $353,335.80, in which sum was included the tax which had been paid on the basis of the inclusion in the estate of the decedent of the properties conveyed by the aforementioned transfer or trust indenture.

Which said claim for refund was in words and figures as follows:

29 CLAIM FOR

Abatement of tax assessed
Credit against outstanding assessments
Refund of taxes illegally collected
Refund of amounts paid for stamps used in error or excess

STATE OF ILLINOIS,
County of Cook, ss:

The Northern Trust Company, executor of the estate of Adolphus C. Bartlett, deceased, LaSalle & Monroe Streets, Chicago

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

(1) Business in which engaged: .....
(2) Character of assessment or tax: Federal estate tax.
(3) Amount of assessment or stamps purchased: $540,480.24.
(4) Reduction of tax liability requested (income and profits tax): $.....
(5) Amount to be abated: $.....
(6) Amount to be refunded (or such greater amount as is legally refundable): $353,335.80.
(7) Dates of payment (see collector's receipts or indorsements of canceled checks): May 29, 1923, May 29, 1924, and June 16, 1924.

(If statement covers income tax liability, items 8-11, inclusive, must be answered.)

(8) District in which return (if any) was filed: Chicago, Illinois

A Federal estate tax was, on May 29, 1923, paid in the above estate in the sum of $225,407.01. Said tax was erroneously computed and the correct tax on the amount of the net estate listed in the return

was $225,307.01. The sum of $100.00 was improperly paid and should be refunded. There was included in the gross estate listed in said return $122,000 of life insurance on the life of said decedent receivable by beneficiaries other than the executor. The taxpayer contends that the taxation of such life insurance is unconstitutional and that the tax resulting therefrom, which was included in the payment of May 29, 1923, should be refunded.

21 In accordance with the letter of the Commissioner of Internal Revenue dated May 1, 1924, and received by the taxpayer on May 12, 1924, an additional tax of $314,993.93 was assessed against the taxpayer. This assessment covered numerous changes in the assets listed in the return, but was mainly the result of a holding on the part of said commissioner that certain trusts created by said decedent during his lifetime for the benefit of the members of his family were taxable under the provisions of the Federal estate-tax law. Said taxpayer, on May 29, 1924, paid $45,398.00 in part payment of said additional tax, and on June 10, 1924, paid $269,595.93, being the full balance thereof. Said taxpayer contends that each and every change in valuations is unwarranted, and further that the inclusion in the gross estate of the property transferred in trust as aforesaid is improper, unconstitutional and entirely without warrant in law, and that the tax resulting therefrom should be refunded.

There was also included, in accordance with the regulations then in force, in the gross estate in the return filed by the taxpayer, the value of certain property transferred in trust for the benefit of decedent's daughter, Eleanor B. Perdue. This trust, numbered by the Northern Trust Company, trustee, 3048, was created by decedent on December 30, 1910. There was also included in said gross estate the value of certain property transferred in trust for the benefit of decedent's daughter, Florence D. Bartlett. This trust, numbered by the Northern Trust Company, trustee, 1831, was created by decedent on February 11, 1903.

The taxpayer contends that the inclusion of the property transferred in the trusts in the gross estate is improper, unconstitutional and entirely without warrant in law, and that the tax resulting from such inclusion, which has been paid as heretofore set out, should be refunded.

Through an oversight, only one installment of the income tax chargeable against the taxpayer for the period from January 1, 1922, to May 30, 1922, was claimed as a deduction. The remaining three installments totalling $2,862.25 were proper deductions and are now claimed as such and the tax paid through the failure to include said deductions should be refunded.

Taxpayer requests a hearing before the committee on appeals and review.

(Attach additional sheets if necessary.)

22 Sworn to and subscribed before me this 30th day of July, 1924.

(Sgd.) F. G. GRADY,
Notary Public.

(Signed) NORTHERN TRUST CO.,
Executor of the Estate of Adolphus C. Bartlett, deceased.
By A. B. CASWELL.

(This affidavit may be sworn to before a deputy collector of internal revenue or revenue agent without charge.)

25. That on, to wit, the 5th day of March, 1925, the said Commissioner of Internal Revenue rejected and denied said claim for refund with the exception of certain minor assessments which, it was admitted had been improperly made against the taxpayer; that is to say, to wit, he admitted that there had been improperly included in the gross estate an item of $30,208.39, and that in addition there should be allowed a deduction amounting to $2,862.25, which said amounts, when properly credited, reduced the said tax by the sum of $5,968.91. The claim for refund, so far as the said last sum was concerned, was allowed and certified; the balance of the claim for refund was denied and rejected. The said allowance and said denial and rejection, as aforesaid, were in words and figures as follows:

MARCH 5, 1925.

MT—ET—Cl. R—3418—PEM
District of First Illinois.
Estate of Adolphus C. Bartlett.
Date of death, May 30, 1922.
The NORTHERN TRUST COMPANY,
Executor, Estate of Adolphus C. Bartlett,
50 South LaSalle Street,
Chicago, Illinois.

SIRS:

The bureau has examined the claim filed by you, as executor of the above-named estate, for refund of $353,535.90 of the Federal estate tax paid under the revenue act of 1921.

A conference was held in the office of the Deputy Commissioner of Internal Revenue, estate-tax division, on October 14, 1924, at which the estate was represented by J. F. Dammann, junior, and Stuart J. Templeton. The matter considered at this conference relates
23 to the taxability of the trust referred to in the estate's brief as Mrs. Bartlett's trust and the children's trust. The trust for Mrs. Bartlett provided in effect that it should terminate not earlier than five years after decedent's death. The children's trusts provided that they should terminate five years after decedent's death. By the express provisions of the five trusts they could not terminate until a time after the decedent's death. After careful consideration of all the evidence on file the bureau is of the opinion that its former

action in including these transfers in the decedent's gross estate should be adhered to.

It is contended by the estate that the items set out in bureau letter of May 1, 1924, and described as "surplus income over and above annuity of $24,000 to decedent's wife" and included in the decedent's estate at $30,298.39 was included in the amounts totaling the sum of $687,813.90. Evidence has been presented by the estate which fully supports its contention. Therefore the sum of $30,298.39 is excluded from the decedent's gross estate, resulting in the following adjustment:

Transfers	Returned	Adjusted
Surplus income over and above annuity of $24,000 to decedent's wife	$0.00	$0.00
Additional income tax paid for period from January 1, 1922, to May 30, 1922	.00	2,862.25

It appears from the statement of the executor that there were additional income taxes due for the period prior to the decedent's death which had not been heretofore allowed as a deduction. This item represents a proper item of deduction and therefore adjustment is made as shown above.

Part of your protest is directed against the inclusion in the decedent's gross estate of life insurance payable to named beneficiaries other than the estate, it being stated in your claim that the taxation of such life insurance is unconstitutional.

You are advised that, in view of the express provisions of the revenue act of 1921 and the fact that the Government has appealed from the decision in a recent case involving the same question, the bureau is of the opinion that the insurance was properly included in the gross estate.

In the review of May 1, 1924, the gross estate was determined to be $4,708,808.49, the deductions $270,469.92, and the net estate $4,438,-
338.57. The reduction made in connection with the items pro-
24 tested and affecting the value of the gross estate amounts to $30,298.39, making the corrected total thereof $4,678,510.10. The increase in the deductions amounts to $2,862.25, making the corrected total thereof $273,332.17. The resultant net estate is accordingly now determined to be $4,405,177.93, the tax upon the transfer of which is $534,432.03. As a tax of $540,400.94 has been paid by the estate, an excess payment has been made in the sum of $5,968.91.

In view of the foregoing, your claim for $353,335.90 will be certified to the disbursing clerk of the Treasury Department for payment in the sum of $5,968.91 and is rejected as to $347,366.99.

Respectfully,

(Signed) D. H. Blair,
Commissioner.

ACS

26. That the said estate tax law, being a part of the said revenue act of 1921, approved and in force the 23d of November, 1921, in so far as it purports in the paragraph above quoted (section 402, subsection (c)) to require that there be included in the gross estate of the decedent for the purposes of taxation the property transferred by a transfer or trust made or created before the passage of the said revenue act is unconstitutional and void in that it takes away the property of the plaintiff without due process of law, in violation of the fifth amendment of the Constitution of the United States, and does not provide a transfer tax or an indirect tax but provides a direct or capitation tax not laid in proportion to the census enumeration and in violation of Article 1, section 9, subsection 4, of the Constitution of the United States.

27. That if the said estate tax law is so construed as to impose a tax on the transfer made by the indenture of trust above referred to, then the said estate tax law as so construed is unconstitutional and void in that it takes away the property of the plaintiff without due process of law, in violation of the fifth amendment of the Constitution of the United States, and does not provide, as its purports, a transfer tax or an indirect tax, but is a direct or capitation tax in violation of Article 1, section 9, subsection 4, of the Constitution of the United States, and not laid in proportion to the census or enumeration, as therein provided.

25 28. That the said estate tax law was not in force and effect at the time the said transfer, evidenced by the said indenture or trust, was made.

29. That the said indenture of trust transferred a vested interest in the properties covered by said trust indenture and was a completed transaction at the time the said transfer was made, to wit, on the date it bears.

30. That ever if the said estate tax provisions of the said revenue act of 1921 be found to be constitutional, no part of the property passing to the Northern Trust Company as trustee under the said trust indenture is or ought to be considered as a portion of the estate of the deceased grantor, Adolphus C. Bartlett, and taxable within the terms of the said act.

31. That the said transfer was not a transfer made in contemplation of death of the grantor, or a transfer to take effect in possession or enjoyment at or after his death, and therefore the said property transferred by said trust indenture should not have been included in the gross estate of the decedent in computing the said tax.

32. That the said estate tax law aforesaid did not authorize the assessment and collection of the additional tax above referred to of $314,993.93, assessed and collected as aforesaid, in so far as said additional tax was computed by an inclusion in the estate of the said decedent of the said property passing by virtue of the said trust indenture; and the said additional tax assessed and collected as aforesaid, after giving credit for the refund as allowed above, referred to, of $5,968.91, and in so far as the said additional tax represents a

tax on the property passing by virtue of the said trust indenture, was wrongfully collected, and should be repaid to the plaintiff, with interest.

By reason whereof the said defendant became liable, and is bound by law, to refund and pay to the plaintiff the amount so paid, $129,260.21, with interest thereon, according to the statute made and provided.

SECOND COUNT

For that whereas the plaintiff alleges:

1. That it adopts, for the purposes of this count in this declaration, the following numbered paragraphs as found in the first count hereof, with like effect as though they were set up in full herein, that
26 is to say, paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11, except that the said paragraphs shall here be read with reference to the facts set up in this count of this declaration.

12. The said Adolphus C. Bartlett during his lifetime, and in and by a certain indenture of trust bearing date the 1st day of March, 1919, transferred and conveyed to the Northern Trust Company, a corporation authorized to accept and execute trusts under the laws of the State of Illinois, and having its principal place of business in the city of Chicago, county of Cook, and State of Illinois, as trustee, certain properties more specifically described in the said instrument, which said indenture of trust, for the purposes of identification, bears the number of the Northern Trust Company, No. 4478.

That on, to wit, the 28th day of June, 1921, by an instrument in writing, the said trust indenture was, in accordance with the powers therein contained, amended in certain particulars, which will more specifically appear from the said instrument of amendment. And the said trust indenture and the amendment thereto above spoken of were in words and figures as follows:

This indenture, made this first day of March, in the year of our Lord one thousand nine hundred and nineteen (A. D. 1919), by and between Adolphus C. Bartlett, of the city of Chicago, county of Cook, and State of Illinois, the party of the first part, and the Northern Trust Company, of Chicago (hereinafter termed the "trustee"), a corporation organized and doing business under the laws of the State of Illinois, the party of the second part, witnesseth:

Article First

The party of the first part, being desirous of establishing and creating the trust hereinafter mentioned, for the purposes and upon the terms set forth, in consideration of the premises and influenced by love and affection for the beneficiary hereinafter named, does hereby sell, assign, transfer and set over unto the trustee the following securities, to wit:

300 shares of the stock of the First National Bank of Chicago;
200 shares of the stock of the Elgin National Watch Company;
200 shares of the stock of the Commonwealth Edison Company;
27 100 shares of the stock of the Illinois Central Railroad Company;
300 shares of the common stock of the Chicago & Northwestern Railway Company;
19 bonds of P. F. Pettibone & Company, of the par value of $1,000 each;
6 bonds of the sanitary district of Chicago, of the par value of $1,000 each;
5 bonds of Armour & Company, of the par value of $1,000 each; to be held and disposed of under and in pursuance of the terms of this indenture.

Article Second

The trustee shall have power and authority at any time, and from time to time—

(1) To receive and collect all dividends declared and paid upon any shares of stock at any time subject to the terms of this agreement, and the interest upon all moneys, bonds or obligations at any time held by it hereunder, and also all rents and other income which shall accrue or become due and payable on or from any of the trust estate hereunder.

(2) To sell, transfer, assign and convey any or all of the stocks, bonds, obligations, securities, real estate or other property held at any time by said trustee under this instrument, and to invest and reinvest the proceeds thereof in either real or personal property, including dividend-paying stocks of corporations; provided, however, that during the life of said party of the first part said trustee shall be governed by any instructions or directions given to it in writing by said party of the first part in regard to the management, sale or investment of any part of the said trust estate, and said trustee shall be free from any liability or responsibility for any action by it done under or in pursuance of any such written directions or instructions. In no event shall any purchaser from the trustee, or any person or corporation dealing with the trustee, be required to ascertain the authority and power of the trustee to make any sale, conveyance or transfer of any part of the trust estate held hereunder, but every such purchaser and all other parties shall be entitled to rely upon the delivery of the transfer, assignment or conveyance by the trustee of any or all of said trust estate as having been in all respects
28 fully authorized, and shall not be affected by any notice to the contrary, or be required to see to the application of the purchase money.

(3) To exercise the voting power upon all shares of stock held by the trustee hereunder, and to exercise every power, election and discretion, give every notice, make every demand, and do every act

and thing in respect of any shares of stock or bonds or other obligations and securities held by the trustee hereunder, which it might or could do if it were the absolute owner thereof; provided, however, that upon the written request of said first party it shall be the duty of the trustee to execute, or cause to be executed, to the person or persons named in such request a proxy, entitling him or them (with full power of substitution) to vote in respect of any shares of stock in such written request or proxy defined and mentioned, at any meeting or meetings of the stockholders of any corporation or corporations specified in such request and proxy.

(4) To receive any and all stock dividends declared, and any other distribution which may be made by any corporation, any of whose shares of stock at the time constitute a part of the principal of the trust estate, and also all proceeds which may be paid on or in respect of any such shares of stock on the liquidation of the company issuing the same, or upon the sale (whether voluntary or involuntary) of its assets, or any part thereof, or which may be otherwise paid out of capital or on account of the principal of any bond, stock or other security; and may in its discretion join in any plan of reorganization or of readjustment of any corporation, any of whose shares of stock, bonds or other securities or obligations may at any time constitute a part of the principal of the trust estate, and accept the substituted securities in and by said plan allotted in respect of the securities and obligations so held by the trustee.

(5) To execute leases of any real estate which shall form a part of the said trust at any time, at such rental, and upon such terms, and for such length of time (not exceeding two hundred (200) years) as it may deem best; to erect buildings, or to change, alter or make additions to any existing buildings upon any real estate which may form a part of said trust estate; and to do all other acts in relation to the said real estate which in the judgment of said trustee shall be needful or desirable to the proper and advantageous management thereof, so as to protect the same and make the same productive; provided, however, that in every case the said trustee shall observe and be governed by any instructions or request in relation thereto made by an instrument in writing, signed by said first party.

Article Third—Distributon and application of income

The term "net income" as used in this indenture shall be held to mean and include all sums received by the trustee by way of dividends, interest or rents from the trust estate or any part thereof, after making any and all deductions therefrom in this instrument provided for or required by law. Such net income as and when received by the trustee shall be applied and disposed of by the trustee as follows:

(1) During the lifetime of said party of the first part said net income shall be accumulated and added to the principal of said trust

estate; provided, however, that such payments out of said net income as may be approved or directed in writing by the said party of the first part shall be made from time to time to the son of said party of the first part, Frederic Clay Bartlett, or to the guardian of his surviving issue in the event of his death during the life of said party of the first part.

(2) From the death of said party of the first part the net income of said trust estate shall be paid over to the said Frederic Clay Bartlett, the son of said party of the first part, for and during his life, or until the termination of the trust, as hereinafter provided.

Article Fourth—Distribution of principal of trust estate

The trust hereby created shall terminate at the expiration of five (5) years from the death of the said party of the first part; provided, however, that if the said Frederic Clay Bartlett shall die prior to the expiration of said five (5) years, then and in that case said trust shall terminate at the death of the survivor of the said party of the first part and the said Frederic Clay Bartlett. And upon the termination of said trust the said trust estate shall be paid over to Frederic Clay Bartlett if he shall be then living, and if he shall not be then living said trust estate shall be held, distributed or disposed of in accordance with the provisions of the last will and testament of said Frederic Clay Bartlett. And in case said Frederic Clay Bartlett shall not dispose of said trust estate by his last will and testament, then said trust estate shall be distributed and paid over to the surviving issue of said Frederic Clay Bartlett per stirpes; and in default of such surviving issue then the same shall be distributed and paid over to the surviving issue of said party of the first part per stirpes.

Article Fifth—Concerning the trustee

The trustee hereby accepts the trust created by this indenture and agrees to act in accordance with its terms and provisions.

The trustee may consult with counsel and shall be fully protected in any action or nonaction taken, permitted, or suffered by it in good faith and in accordance with the opinion of counsel selected or provided by it; and in case of legal proceedings involving the trustee or the trust estate the trustee may defend such proceedings and may, upon being advised by counsel that such action is necessary or advisable for the protection of the interests of the trustee, or of the beneficiaries, institute any legal proceedings.

The trustee shall be reimbursed and indemnified against any and all liability, loss, or expense because of the holding of any shares of stock or other properties constituting a part of the principal of the trust estate, either in its own name or in the name of a nominee, and shall have a lien upon the principal of the trust estate and the

income therefrom for the amount of any liability, loss or expense which may be so incurred by it, including the expense of defending any action or proceeding instituted against it or such nominee by reason of any such holding.

Out of the income of the principal of the trust estate the trustee shall pay all taxes, assessments or other governmental charges which it may be required to pay or to retain because or in respect of any part of the principal of the trust estate or the income therefrom or the interest of the trustee therein or the interest of any bene-
31 ficiary or other person therein, under any present or future law or the United States, or of any State, county, municipality, or other taxing authority therein, any and all such taxes, assessments or other governmental charges lawfully imposed being charged as a lien upon the said income, and in case of deficiency of said income upon the principal of the trust estate.

The said trustee, or any successor in trust, may resign at any time by giving notice in writing of such resignation to said first party while he shall live, and after his death by giving notice in writing of such resignation to the beneficiary hereinbefore named.

In case of the resignation of any trustee acting hereunder, or of its disability or incapacity to further act as trustee, said party of the first part, if living, and after his death the said Frederic Clay Bartlett, shall have power to appoint a successor in trust by an instrument in writing, delivered to said trustee, and upon the appointment of such successor in trust the said trustee shall sell, convey, assign, and deliver to such successor in trust all of the trust estate then in its hands, and thereupon and thereafter such successor in trust shall have all the rights, powers, duties and authority which were granted to or imposed upon said original trustee under the provisions of this indenture.

Article Sixth—Miscellaneous provisions

(1) Said grantor has created the foregoing trust to provide for the support and maintenance of the beneficiaries entitled to share in the income of said trust estate, and the said beneficiaries shall have no power to anticipate, assign or otherwise dispose of or encumber their respective interests in said trust estate, and the same shall not be subject to be taken from them by process of law.

(2) Any of the provisions in this trust deed may be altered, changed or modified in any respect and to any extent, at any time, by an instrument in writing signed by the said party of the first part and by the said Frederic Clay Bartlett, and delivered to the trustee; and after the date of any such modification or alteration this indenture as so modified or altered shall be in force and govern the rights, and powers of all parties concerned, the same in all
32 respects as though such original indenture had been executed in such modified or altered form.

In witness whereof the parties hereto have executed this instrument under seal the day and year first above written.

ADOLPHUS C. BARTLETT. [SEAL.]
THE NORTHERN TRUST COMPANY,
By SOLOMON A. SMITH, *President.*

Attest:
[SEAL.] H. H. ROCKWELL,
Asst. Secretary.

AMENDMENT, JUNE 28, 1921

To the NORTHERN TRUST COMPANY,
of Chicago, as trustee.

You are hereby notified that we, the undersigned, Adolphus C. Bartlett and Frederick Clay Bartlett (the said Adolphus C. Bartlett being the grantor and party of the first part, said The Northern Trust Company as trustee being the grantee and party of the second part, and the said Frederick Clay Bartlett being the beneficiary, in a certain trust indenture dated the 1st day of March, 1919), do hereby, in pursuance of the power in us vested by the terms of said trust indenture, alter, change and modify the provisions of said trust indenture by striking out the whole of the third article of said trust indenture and inserting in lieu thereof, as a part of said trust indenture, the following:

"Article Third—Distribution and application of income

"The term 'net income' as used in this indenture shall be held to mean and include all sums received by the trustee by way of interest, dividends or rents from the trust estate, or any part thereof, after making any and all deductions therefrom in this instrument provided for or required by law. Such net income, as and when received by the trustee, shall be applied and disposed of by the trustee as follows:

"The beneficiaries entitled to ask for and receive the said net income shall be Frederick Clay Bartlett during his life,
33 and in the event of his death, leaving issue him surviving, the guardian of such issue shall be entitled to receive said net income; and in default of any such surviving issue then from the date of such default the surviving issue of said party of the first part, per stirpes, shall be entitled to receive said net income. So much of the net income as the beneficiary or beneficiaries entitled thereto shall ask for during each year shall be paid over to him or them, and the remainder thereof not paid over to the beneficiary or beneficiaries in each calendar year shall be added to and become a part of the principal of said trust estate at the end of each calendar year."

In witness whereof we, the undersigned, have hereunto set our hands and seals this 28th day of June, A. D. 1921.

ADOLPHUS C. BARTLETT. [SEAL.]
FREDERIC CLAY BARTLETT. [SEAL.]

In presence of—
DOYLE E. HINTON.
ROBERT O. BURLEY.

STATE OF WISCONSIN,
County of Walworth, ss:

I, Annie F. Napper, a notary public in and for said county, in the State aforesaid, do hereby certify that Adolphus C. Bartlett, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said instrument as his free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal this 28th day of June, A. D. 1921.

ANNIE F. NAPPER,
Notary Public.

My commission expires April 27, 1924.

STATE OF WISCONSIN,
County of Walworth, ss:

I, Annie F. Napper, a notary public in and for said county, in the State aforesaid, do hereby certify that Frederic Clay Bartlett, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in
74 person and acknowledged that he signed, sealed, and delivered the said instrument as his free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal this 28th day of June, A. D. 1921.

ANNIE F. NAPPER,
Notary Public.

My commission expires April 27, 1924.

13. That it adopts for the purposes of this count of this declaration, with like effect as though they were set up in full herein, the following numbered paragraphs of the first count of this declaration: Numbers 13, 14, 15, 16, and 17, except that the said paragraphs shall here be read with reference to the facts set up in this count of this declaration; and which said paragraphs contain allegations that the said transfer was not made in contemplation of the death of the grantor or to take effect in possession or enjoyment at or after his death; that the grantor retained no beneficial interest in the property so conveyed, and exercised no dominion or power over it, and that in filing its estate tax return the plaintiff did not include the said property in its computation of the gross value of the estate, but

did give in the said return the full information concerning the said transfer; all of which will more specifically appear by a reference to said paragraphs.

18. That thereafter the Commissioner of Internal Revenue conducted an investigation of the said return of the plaintiff as said executor of the value of the net estate of Adolphus C. Bartlett, deceased, and of the value of the properties conveyed by the said trust indenture above referred to, and fixed and determined the value of the said properties in the sum of $323,735.32, included the said value in the computation of the gross estate of the decedent, and thereby increased in a like amount the value of the net estate of the said Adolphus C. Bartlett, deceased, for the purpose of the assessment of the said estate tax.

19. That thereupon the said Commissioner of Internal Revenue, on or about the 1st day of May, 1924, did assess an additional tax, computed on the inclusion in the gross estate of the decedent of the above-mentioned value of the properties above referred to, and also the value of certain other properties elsewhere referred to; which additional tax as assessed on all such properties amounted to the sum of $314,983.95, of which total amount the sum of $58,272.36 represented the additional tax assessed as the result of the inclusion in the gross estate of the decedent of the properties referred to and conveyed by the said trust indenture.

20. That it adopts for the purposes of this count of this declaration, with like effect as though they were set up in full herein, the following numbered paragraphs of the first count of this declaration: Numbers 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, and 32, except that the said paragraphs shall here be read with reference to the facts set up in this count of this declaration; and which said paragraphs contain allegations concerning the notice, demand and payment of the said additional tax, the claim for refund, the denial of the Commissioner of Internal Revenue of the claim for refund, and the averments of the plaintiff that the said property should not be taxed, all of which will more specifically appear by reference to said paragraphs.

By reason whereof the said defendant became liable, and is bound by law, to refund and pay to the plaintiff the amount so paid of $58,272.36, with interest thereon according to statute made and provided.

Third Count

For that whereas the plaintiff alleges:

1. That it adopts, for the purposes of this count in this declaration, the following numbered paragraphs as found in the first count thereof, with like effect as though they were set up in full herein, that is to say, paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11, except that the said paragraphs shall here be read with reference to the facts set up in this count of this declaration.

12. The said Adolphus C. Bartlett during his lifetime, and in and by a certain indenture of trust bearing date the 1st day of March, 1919, transferred and conveyed to the Northern Trust Company, a corporation authorized to accept and execute trusts under the laws of the State of Illinois, and having its principal place of business in the city of Chicago, county of Cook, and State of Illinois, as trustee, certain properties more specifically described in the said instrument, which said indenture of trust, for the purposes of identification, bore the number of the Northern Trust Company, No. 4479.

That on, to wit, the 28th day of June, 1921, by an instrument
36 in writing, the said trust indenture was, in accordance with the powers therein contained, amended in certain particulars, which will more specifically appear from the said instrument of amendment. And the said trust indenture and the amendment thereto above spoken of were in words and figures as follows:

This indenture, made this first day of March in the year of our Lord one thousand nine hundred and nineteen (A. D. 1919), by and between Adolphus C. Bartlett, of the city of Chicago, county of Cook, and State of Illinois, the party of the first part, and the Northern Trust Company, of Chicago (hereinafter termed the trustee), a corporation organized and doing business under the laws of the State of Illinois, the party of the second part, witnesseth:

Article First

The party of the first part, being desirous of establishing and creating the trust hereinafter mentioned, for the purposes and upon the terms set forth, in consideration of the premises and influenced by love and affection for the beneficiary hereinafter named, does hereby sell, assign, transfer and set over unto the trustee the following securities, to wit:

300 shares of the stock of the First National Bank of Chicago;
200 shares of the stock of the Elgin National Watch Company;
200 shares of the stock of the Commonwealth Edison Company;
100 shares of the stock of the Illinois Central Railroad Company;
200 shares of the common stock of the Chicago & Northwestern Railway Company;
36 bonds of the Arizona Publishing Company, of the par value of $500 each;

to be held and disposed of under and in pursuance of the terms of this indenture.

37 Article Second

The trustee shall have power and authority at any time, and from time to time—

1. To receive and collect all dividends declared and paid upon any shares of stock at any time subject to the terms of this agreement, and the interest upon all moneys, bonds, or obligations at any time held by it hereunder, and also all rents and other income which shall accrue or become due and payable on or from any of the trust estate hereunder.

(2) To sell, transfer, assign, and convey any or all of the stocks, bonds, obligations, securities, real estate, or other property held at any time by said trustee under this instrument, and to invest and reinvest the proceeds thereof in either real or personal property, including dividend-paying stocks of corporations; provided, however, that during the life of said party of the first part said trustee shall be governed by any instructions or directions given to it in writing by said party of the first part in regard to the management, sale, or investment of any part of the said trust estate, and said trustee shall be free from any liability or responsibility for any action by it done under or in pursuance of any such written directions or instructions. In on event shall any purchaser from the trustee, or any person or corporation dealing with the trustee, be required to ascertain the authority and power of the trustee to make any sale, conveyance, or transfer of any part of the trust estate held hereunder, but every such purchaser and all other parties shall be entitled to rely upon the delivery of the transfer, assignment, or conveyance by the trustee of any or all of said trust estate as having been in all respects fully authorized, and shall not be affected by any notice to the contrary or be required to see to the application of the purchase money.

(3) To exercise the voting power upon all shares of stock held by the trustee hereunder and to exercise every power, election, and discretion, give every notice, make every demand, and do every act and thing in respect of any shares of stock or bonds or other obligations and securities held by the trustee hereunder which it might or could do if it were the absolute owner thereof; provided, however, that upon the written request of said first party it shall be the duty of the trustee to execute or cause to be executed to the person or persons named in such request a proxy entitling him or them (with full
38 power of substitution) to vote in respect of any shares of stock in such written request or proxy defined and mentioned at any meeting or meetings of the stockholders of any corporation or corporations specified in such request and proxy.

(4) To receive any and all stock dividends declared and any other distribution which may be made by any corporation any of whose shares of stock at the time constitute a part of the principal of the trust estate, and also all proceeds which may be paid on or in respect of any such shares of stock on the liquidation of the company issuing

the same, or upon the sale (whether voluntary or involuntary) of its assets, or any part thereof, or which may be otherwise paid out of the capital or on account of the principal of any bond, stock, or other security; and may in its discretion join in any plan of reorganization or of readjustment of any corporation any of whose shares of stock, bonds, or other securities or obligations may at any time constitute a part of the principal of the trust estate and accept the substituted securities in and by said plan allotted in respect of the securities and obligations so held by the trustee.

(5) To execute leases of any real estate which shall form a part of the said trust at any time at such rental and upon such terms and for such length of time (not exceeding two hundred (200) years) as it may deem best; to erect buildings or to change, alter, or make additions to any existing buildings upon any real estate which may form a part of said trust estate; and to do all other acts in relation to the said real estate which in the judgment of said trustee shall be needful or desirable to the proper and advantageous management thereof, so as to protect the same and make the same productive; provided, however, that in every case the said trustee shall observe and be governed by any instructions or request in relation thereto made by an instrument in writing signed by said first party.

Article Third.—Distribution and application of income

The term "net income" as used in this indenture shall be held to mean and include all sums received by the trustee by way of dividends, interests, or rents from the trust estate or any part thereof, after making any and all deductions therefrom in this instru-
39 ment provided for or required by law. Such net income as and when received by the trustee shall be applied and disposed of by the trustee as follows:

(1) During the lifetime of said party of the first part the net income shall be accumulated and added to the principal of said trust estate; provided, however, that such payments out of said net income as may be approved or directed in writing by the said party of the first part shall be made from time to time to the daughter of said party of the first part, Maie Bartlett Heard, or to the guardian of her surviving issue in the event of her death during the life of said party of the first part.

(2) From the death of said party of the first part the net income of said trust estate shall be paid over to the said Maie Bartlett Heard, the daughter of said party of the first part, for and during her life, or until the termination of the trust, as hereinafter provided.

Article Fourth—Distribution of principal of trust estate

The trust hereby created shall terminate at the expiration of five (5) years from the death of the said party of the first part; provided, however, that if the said Maie Bartlett Heard shall die prior

to the expiration of said five (5) years, then and in that case said trust shall terminate at the death of the survivor of the said party of the first part and the said Maie Bartlett Heard. And upon the termination of said trust the said trust estate shall be paid over to Maie Bartlett Heard if she shall be then living, and if she shall not be then living said trust estate shall be held, distributed, or disposed of in accordance with the provisions of the last will and testament of said Maie Bartlett Heard. And in case said Maie Bartlett Heard shall not dispose of said trust estate by her last will and testament, then said trust estate shall be distributed and paid over to the surviving issue of said Maie Bartlett Heard per stirpes; and in default of such surviving issue then the same shall be distributed and paid over to the surviving issue of said party of the first part per stirpes.

40 Article Fifth—Concerning the trustee

The trustee hereby accepts the trust created by this indenture and agrees to act in accordance with its terms and provisions.

The trustee may consult with counsel and shall be fully protected in any action or nonaction taken, permitted or suffered by it in good faith and in accordance with the opinion of counsel selected or provided by it; and in case of legal proceedings involving the trustee or the trust estate, the trustee may defend such proceedings and may, upon being advised by counsel that such action is necessary or advisable for the protection of the interests of the trustee, or of the beneficiaries, institute any legal proceedings.

The trustee shall be reimbursed and indemnified against any and all liability, loss or expense because of the holding of any shares of stock or other properties constituting a part of the principal of the trust estate, either in its own name or in the name of a nominee, and shall have a lien upon the principal of the trust estate and the income therefrom for the amount of any liability, loss or expense which may be so incurred by it, including the expense of defending any action or proceeding instituted against it or such nominee by reason of any such holding.

Out of the income of the principal of the trust estate the trustee shall pay all taxes, assessments or other governmental charges which it may be required to pay or to retain because of in respect of any part of the principal of the trust estate or the income therefrom or the interest of the trustee therein, or the interest of any beneficiary or other person therein, under any present or future law of the United States, or of any State, county, municipality, or other taxing authority therein, any and all such taxes, assessments or other governmental charges lawfully imposed being charged as a lien upon the said income, and in case of deficiency of said income upon the principal of the trust estate.

The said trustee, or any successor in trust, may resign at any time by giving notice in writing of such resignation to said first party while he shall live, and after his death by giving notice in writing of such resignation to the beneficiary hereinbefore named.

41 In case of the resignation of any trustee acting hereunder, or of its disability or incapacity to further act as trustee, said party of the first part, if living, and after his death the said Maie Bartlett Heard, shall have power to appoint a successor in trust by an instrument in writing, delivered to said trustee, and upon the appointment of such successor in trust the said trustee shall sell, convey, assign and deliver to such successor in trust all of the trust estate then in its hands, and thereupon and thereafter such successor in trust shall have all the rights powers, duties and authority which were granted to or imposed upon said original trustee under the provisions of this indenture.

Article Sixth—Miscellaneous provisions

(1) Said grantor has created the foregoing trust to provide for the support and maintenance of the beneficiaries entitled to share in the income of said trust estate, and the said beneficiaries shall have no power to anticipate, assign, or otherwise dispose of or encumber their respective interests in said trust estate, and the same shall not be subject to be taken from them by process of law.

(2) Any of the provisions of this trust deed may be altered, changed, or modified in any respect and to any extent, at any time, by an instrument in writing signed by the said party of the first part and by the said Maie Bartlett Heard, and delivered to the trustee; and after the date of any such modification or alteration this indenture as so modified or altered shall be in force and govern the rights and powers of all parties concerned, the same in all respects as though such original indenture had been executed in such modified or altered form.

In witness whereof the parties hereto have executed this instrument, under seal, the day and year first above written.

ADOLPHUS C. BARTLETT. [SEAL.]
THE NORTHERN TRUST COMPANY,
By SOLOMON A. SMITH, *President.*

Executed in duplicate.
Attest:
[SEAL.] H. H. ROCKWELL,
Asst. Secretary.

42 AMENDMENT OF JUNE 28, 1921

To the NORTHERN TRUST COMPANY,
of Chicago, as trustee.

You are hereby notified that we, the undersigned, Adolphus C. Bartlett and Maie Bartlett Heard (the said Adolphus C. Bartlett being the grantor and party of the first part, said The Northern Trust Company as trustee being the grantee and party of the second part, and the said Maie Bartlett Heard being the beneficiary, in a certain trust indenture dated the 1st day of March, 1919), do hereby, in pursuance of the power in us vested by the terms of said trust

indenture, alter, change, and modify the provisions of said trust indenture by striking out the whole of the third article of said trust indenture and inserting in lieu thereof, as a part of said trust indenture, the following:

"Article Third—Distribution and application of income

"The term 'net income' as used in this indenture shall be held to mean and include all sums received by the trustee by way of interest, dividends, or rents from the trust estate, or any part thereof, after making any and all deductions therefrom in this instrument provided for or required by law. Such net income, as and when received by the trustee, shall be applied and disposed of by the trustee as follows:

"The beneficiaries entitled to ask for and receive the said net income shall be Maie Bartlett Heard during her life, and in the event of her death, leaving issue her surviving, the guardian of such issue shall be entitled to receive said net income; and in default of any such surviving issue, then from the date of such default the surviving issue of said party of the first part, per stirpes, shall be entitled to receive said net income. So much of the net income as the beneficiary or beneficiaries entitled thereto shall ask for during each year shall be paid over to her or them, and the remainder thereof not paid over to the beneficiary or beneficiaries in each calendar year shall be added to and become a part of the principal of said trust estate at the end of each calendar year."

In witness whereof we, the undersigned, have hereunto
43 set our hands and seals this 28th day of June, A. D. 1921 (1921).

ADOLPHUS C. BARTLETT. [SEAL.]
MAIE BARTLETT HEARD. [SEAL.]

In presence of—
DOYLE E. HINTON.
ROBERT O. BURLEY.
R. E. SUGAR.
ALFRED HARIN.

STATE OF WISCONSIN,
County of Walworth, ss.

I, Annie F. Napper, a notary public in and for said county, in the State aforesaid, do hereby certify that Adolphus C. Bartlett, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said instrument as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 28th day of June, A. D. 1921 (1921).

ANNIE F. NAPPER,
Notary Public.

My commission expires April 27, 1924.

STATE OF KINGDOM OF GREAT BRITAIN AND IRELAND,
City of London, England,
County of United States Consulate General, ss:

I, Richard Westacott, vice consul of the United States of America at London, England, in and for said county, in the State aforesaid, do hereby certify that Maie Bartlett Heard, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that she signed, sealed, and delivered the said instrument as her free and voluntary act for the uses and purposes therein set forth.

Given under my hand and official this 15th day of July, A. D. 1921.

#9312.

R. WESTACOTT,
Vice Consul of the United States of America at London, England.

44 13. That it adopts for the purposes of this count of this declaration, with like effect as though they were set up in full herein, the following numbered paragraphs of the first count of this declaration: Numbers 13, 14, 15, 16 and 17, except that the said paragraphs shall here be read with reference to the facts set up in this count of this declaration; and which said paragraphs contain allegations that the said transfer was not made in contemplation of the death of the grantor, or to take effect in possession of enjoyment at or after his death; that the grantor retained no beneficial interest in the property so conveyed, and exercised no dominion or power over it, and that in filing its estate tax return the plaintiff did not include the said property in its computation of the gross value of the estate, but did give in the said return the full information concerning the said transfer, all of which will more specifically appear by a reference to said paragraphs.

18. That thereafter the Commissioner of Internal Revenue conducted an investigation of the said return of the plaintiff as said executor, of the value of the net estate of Adolphus C. Bartlett, deceased, and of the value of the properties conveyed by the said trust indenture above referred to, fixed and determined the value of the said properties in the sum of $302,492.43, included the said value in the computation of the gross estate of the decedent, and thereby increased in a like amount the value of the net estate of the said Adolphus C. Bartlett, deceased, for the purpose of the assessment of the said estate tax.

19. That thereupon the said Commissioner of Internal Revenue, on or about the 1st day of May, 1924, did **assess an additional tax,** computed on the inclusion in the gross estate of the decedent of the above-mentioned value of the properties above referred to, and also the value of certain other properties elsewhere referred to, which additional tax as assessed on all such properties amounted to the

sum of $314,993.93, of which total amount the sum of $54,588.64 represented the additional tax assessed as the result of the inclusion in the gross estate of the decedent of the properties referred to and conveyed by the said trust indenture.

20. That it adopts for the purposes of this count of this declaration, with like effect as though they were set up in full herein, the following numbered paragraphs of the first count of this declaration:

Numbers 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31 and 32,
45 except that the said paragraphs shall here be read with reference to the facts set up in this count of this declaration; and which said paragraphs contain the allegations concerning the notice, demand, and payment of the said additional tax, the claim for refund, the denial of the Commissioner of Internal Revenue of the claim for refund, and the averments of the plaintiff that the said property should not be taxed, all of which will more specifically appear by reference to said paragraphs.

By reason whereof the said defendant became liable, and is bound by law, to refund and pay to the plaintiff the amount so paid of $54,588.64, with interest thereon, according to statute made and provided.

FOURTH COUNT

For that whereas the plaintiff alleges:

1. That it adopts, for the purposes of this count in this declaration, the following numbered paragraphs as found in the first count thereof with like effect as though they were set up in full herein, that is to say: Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11, except that the said paragraphs shall here be read with reference to the facts set up in this count of this declaration.

12. The said Adolphus C. Bartlett during his lifetime, and in and by a certain indenture of trust bearing date the 1st day of March, 1919, transferred and conveyed to the Northern Trust Company, a corporation authorized to accept and execute trusts under the laws of the State of Illinois, and having its principal place of business in the city of Chicago, county of Cook, and State of Illinois, as trustee, certain properties more specifically described in the said instrument, which said indenture of trust, for the purposes of identification, bears the number of the Northern Trust Company, No. 4480.

That on, to wit, the 28th day of June, 1921, by an instrument in writing, the said trust indenture was, in accordance with the power therein contained, amended in certain particulars, which will more specifically appear from the said instrument of amendment. And the said trust indenture and the amendment thereto above spoken of were in words and figures as follows:

This indenture, made this first day of March, in the year of our
46 Lord one thousand nine hundred and nineteen (A. D. 1919), between Adolphus C. Bartlett, of the city of Chicago, county of Cook, and State of Illinois, the party of the first part,

and the Northern Trust Company, of Chicago (hereinafter termed the "trustee"), a corporation organized and doing business under the laws of the State of Illinois, the party of the second part, witnesseth:

Article First

The party of the first part, being desirous of establishing and creating the trust hereinafter mentioned, for the purposes and upon the terms set forth, in consideration of the premises and influenced by love and affection for the beneficiary hereinafter named, does hereby sell, assign, transfer and set over unto the trustee the following securities, to wit:

300 shares of the stock of the First National Bank of Chicago;
200 shares of the stock of Commonwealth Edison Company of Chicago;
100 shares of the stock of the Illinois Central Railroad Company;
100 shares of the common stock of the Chicago & Northwestern Railway Company;
10 bonds of Morris & Company, of the par value of $1,000 each;
10 bonds of the Central Manufacturing Company, of the par value of $1,000 each;
5 bonds of the American Foreign Securities, of the par value of $1,000 each;
5 bonds of Armour & Company, of the par value of $1,000 each;

to be held and disposed of under and in pursuance of the terms of this indenture.

Article Second

The trustee shall have power and authority at any time, and from time to time—

(1) To receive and collect all dividends declared and paid upon any shares of stock at any time subject to the terms of this agreement, and the interest upon all moneys, bonds or obligations at any
47 time held by it hereunder, and also all rents and other income which shall accrue or become due and payable on or from any of the trust estate hereunder.

(2) To sell, transfer, assign, and convey any or all of the stocks, bonds, obligations, securities, real estate, or other property held at any time by said trustee under this instrument, and to invest and reinvest the proceeds thereof in either real or personal property, including dividend-paying stocks of corporations; provided, however, that during the life of said party of the first part said trustee shall be governed by any instructions or directions given to it in writing by said party of the first part in regard to the management, sale, or investment of any part of the said trust estate, and said trustee shall be free from any liability or responsibility for any action by it done under or in pursuance of any such written directions or instruc-

tions. In no event shall any purchaser from the trustee, or any person or corporation dealing with the trustee, be required to ascertain the authority and power of the trustee to make any sale, conveyance, or transfer of any part of the trust estate held hereunder, but every such purchaser and all other parties shall be entitled to rely upon the delivery of the transfer, assignment, or conveyance by the trustee of any or all of said trust estate as having been in all respects fully authorized, and shall not be affected by any notice to the contrary, or be required to see to the application of the purchase money.

(3) To exercise the voting power upon all shares of stock held by the trustee hereunder, and to exercise every power, election, and discretion, give every notice, make every demand, and do every act and thing in respect of any shares of stock or bonds, or other obligations and securities held by the trustee hereunder, which it might or could do if it were the absolute owner thereof; provided, however, that upon the written request of said first party it shall be the duty of the trustee to execute, or cause to be executed, to the person or persons named in such request a proxy, entitling him or them (with full power of substitution) to vote in respect of any shares of stock in such written request or proxy defined and mentioned, at any meeting or meetings of the stockholders of any corporation or corporations specified in such request and proxy.

(4) To receive any and all stock dividends declared, and any other distribution which may be made by any corporation, any of
68 whose shares of stock at the time constitute a part of the principal of the trust estate, and also all proceeds which may be paid or in respect of any such shares of stock on the liquidation of the company issuing the same, or upon the sale (whether voluntary or involuntary) of its assets, or any part thereof, or which may be otherwise paid out of capital or on account of the principal of any bond, stock, or other security; and may in its discretion join in any plan of reorganization or of readjustment of any corporation, any of whose shares of stock, bonds, or other securities or obligations may at any time constitute a part of the principal of the trust estate, and accept the substituted securities in and by said plan allotted in respect of the securities and obligations so held by the trustee.

(5) To execute leases of any real estate which shall form a part of the said trust at any time, at such rental, and upon such terms, and for such length of time (not exceeding two hundred (200) years) as it may deem best; to erect buildings, or to change, alter, or make additions to any existing buildings upon any real estate which may form a part of said trust estate; and to do all other acts in relation to the said real estate which in the judgment of said trustee shall be needful or desirable to the proper and advantageous management thereof, so as to protect the same and make the same productive; provided, however, that in every case the said trustee shall observe and be governed by any instructions or request in relation thereto made by an instrument in writing, signed by said first party.

Article Third—Distribution and application of income

The term "net income" as used in this indenture shall be held to mean and include all sums received by the trustee by way of dividends, interest, or rents from the trust estate or any part thereof, after making any and all deductions therefrom in this instrument provided for or required by law. Such net income as and when received by the trustee shall be applied and disposed of by the trustee as follows:

(1) During the lifetime of said party of the first part said net income shall be accumulated and added to the principal of said trust estate; provided, however, that such payments out of said net income as may be approved or directed in writing by the said party of the first part shall be made from time to time to the daughter of said party of the first part, Eleanor Bartlett Perdue, or to the guardian of her surviving issue in the event of her death during the life of said party of the first part.

(2) From the death of said party of the first part the net income of said trust estate shall be paid over to the said Eleanor Bartlett Perdue, the daughter of said party of the first part, for and during her life, or until the termination of the trust, as hereinafter provided.

Article Fourth—Distribution of principal of trust estate

The trust hereby created shall terminate at the expiration of five (5) years from the death of the said party of the first part; provided, however, that if the said Eleanor Bartlett Perdue shall die prior to the expiration of said five (5) years, then and in that case said trust shall terminate at the death of the survivor of the said party of the first part and the said Eleanor Bartlett Perdue. And upon the termination of said trust the said trust estate shall be paid over to Eleanor Bartlett Perdue, if she shall be then living, and if she shall not be then living said trust estate shall be held, distributed, or disposed of in accordance with the provisions of the last will and testament of said Eleanor Bartlett Perdue. And in case said Eleanor Bartlett Perdue shall not dispose of said trust estate by her last will and testament then said trust estate shall be distributed and paid over to the surviving issue of said Eleanor Bartlett Perdue per stirpes; and in default of such surviving issue then the same shall be distributed and paid over to the surviving issue of said party of the first part per stirpes.

Article Fifth—Concerning the trustee

The trustee hereby accepts the trust created by this indenture and agrees to act in accordance with its terms and provisions.

The trustee may consult with counsel and shall be fully protected in any action or nonaction taken, permitted, or suffered by it in good faith and in accordance with the opinion

of counsel selected or provided by it; and in case of legal proceedings involving the trustee or the trust estate, the trustee may defend such proceedings and may, upon being advised by counsel that such action is necessary or advisable for the protection of the interests of the trustee, or of the beneficiaries, institute any legal proceedings.

The trustee shall be reimbursed and indemnified against any and all liability, loss, or expense because of the holding of any shares of stock or other properties constituting a part of the principal of the trust estate, either in its own name or in the name of a nominee, and shall have a lien upon the principal of the trust estate and the income therefrom for the amount of any liability, loss, or expense which may be so incurred by it, including the expense of defending any action or proceeding instituted against it or such nominee by reason of any such holding.

Out of the income of the principal of the trust estate the trustee shall pay all taxes, assessments, or other governmental charges which it may be required to pay or to retain because or in respect of any part of the principal of the trust estate or the income therefrom or the interest of the trustee therein, or the interest of any beneficiary or other person therein, under any present or future law of the United States, or of any State, county, municipality, or other taxing authority therein, any and all such taxes, assessments, or other governmental charges lawfully imposed being charged as a lien upon the said income, and in case of deficiency of said income upon the principal of the trust estate.

The said trustee, or any successor in trust, may resign at any time by giving notice in writing of such resignation to said first party while he shall live, and after his death by giving notice in writing of such resignation to the beneficiary hereinbefore named.

In case of the resignation of any trustee acting hereunder, or of its disability or incapacity to further act as trustee, said party of the first part, if living, and after his death the said Eleanor Bartlett Perdue, shall have power to appoint a successor in trust by an instrument in writing, delivered to said trustee, and upon the appointment of such successor in trust the said trustee shall sell, convey, assign, and deliver to such successor in trust all of the trust estate then in its hands, and thereupon and thereafter such successor in trust
31 shall have all the rights, powers, duties, and authority which were granted to or imposed upon said original trustee under the provisions of this indenture.

Article Sixth—Miscellaneous provisions

(1) Said grantor has created the foregoing trust to provide for the support and maintenance of the beneficiaries entitled to share in the income of said trust estate, and the said beneficiaries shall have no power to anticipate, assign, or otherwise dispose of or encumber their respective interests in said trust estate, and the same shall not be subject to be taken from them by process of law.

(2) Any of the provisions in this trust deed may be altered, changed, or modified in any respect and to any extent, at any time, by an instrument in writing signed by the said party of the first part and by the said Eleanor Bartlett Perdue, and delivered to the trustee; and after the date of any such modification or alteration this indenture as so modified or altered shall be in force and govern the rights and powers of all parties concerned, the same in all respects as though such original indenture had been executed in such modified or altered form.

In witness whereof the parties hereto have executed this instrument, under seal, the day and year first above written.

ADOLPHUS C. BARTLETT. [SEAL.]
THE NORTHERN TRUST COMPANY,
By SOLOMON A. SMITH, *President.*

Executed in duplicate.
Attest:
[SEAL.] H. H. ROCKWELL, *Asst. Secretary.*

52 AMENDMENT OF 28TH OF JUNE, 1921

To the NORTHERN TRUST COMPANY, of Chicago, as trustee.

You are hereby notified that we, the undersigned, Adolphus C. Bartlett and Eleanor Bartlett Perdue (the said Adolphus C. Bartlett being the grantor and party of the first part, said The Northern Trust Company as trustee being the grantee and party of the second part, and the said Eleanor Bartlett Perdue being the beneficiary in a certain trust indenture dated the 1st day of March, 1919), do hereby, in pursuance of the power in us vested by the terms of said trust indenture, alter, change, and modify the provisions of said trust indenture by striking out the whole of the third article of said trust indenture and inserting in lieu thereof, as a part of said trust indenture, the following:

"Article Third—Distribution and application of income

"The term 'net income' as used in this indenture shall be held to mean and include all sums received by the trustee by way of interest, dividends, or rents from the trust estate, or any part thereof, after making any and all deductions therefrom in this instrument provided for or required by law. Such net income, as and when received by the trustee, shall be applied and disposed of by the trustee as follows:

"The beneficiaries entitled to ask for and receive the said net income shall be Eleanor Bartlett Perdue during her life, and in the event of her death, leaving issue her surviving, the guardian of such issue shall be entitled to receive said net income; and in default of any such surviving issue then from the date of such default the surviving issue of said party of the first part, per stirpes, shall be entitled to receive said net income. So much of the net income as the beneficiary or beneficiaries entitled thereto shall ask for during each

year shall be paid over to her or them, and the remainder thereof not paid over to the beneficiary or beneficiaries in each calendar year shall be added to and become a part of the principal of said trust estate at the end of each calendar year."

53 In witness whereof we, the undersigned, have hereunto set our hands and seals this 28th day of June, A. D. 1921 (1921).

ELEANOR BARTLETT PERDUE. [SEAL.]
ADOLPHUS C. BARTLETT. [SEAL.]

In presence of—
DOYLE E. HINTON.
ROBERT O. BURLEY.

STATE OF WISCONSIN,
County of Walworth, ss:

I, Annie F. Napper, a notary public in and for said county, in the State aforesaid, do hereby certify that Adolphus C. Bartlett, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said instrument as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 28th day of June, A. D. 1921 (1921).

ANNIE F. NAPPER,
Notary Public.

My commission expires April 27, 1924.

STATE OF ALABAMA,
County of Mobile, ss:

I, T. Potter Yeend, a notary public in and for said county, in the State aforesaid, do hereby certify that Eleanor Bartlett Perdue, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that she signed, sealed, and delivered the said instrument as her free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 6th day of July, A. D. 1921 (1921).

T. POTTER YEEND,
Notary Public.

13. That it adopts for the purposes of this count of this
54 declaration, with like effect as though they were set up in full herein, the following numbered paragraphs of the first count of this declaration: Numbers 13, 14, 15, 16, and 17, except that the said paragraphs shall here be read with reference to the facts set up in this count of this declaration; and which said paragraphs contain allegations that the said transfer was not made in contemplation of the death of the grantor, or to take effect in possession or enjoyment at or after his death; that the grantor retained no beneficial interest

in the property so conveyed, and exercised no dominion or power over it, and that in filing its estate tax return the plaintiff did not include the said property in its computation of the gross value of the estate, but did give in the said return the full information concerning the said transfer, all of which will more specifically appear by a reference to said paragraphs.

18. That thereafter the Commissioner of Internal Revenue conducted an investigation of the said return of the plaintiff as said executor, of the value of the net estate of Adolphus C. Bartlett, deceased, and of the value of the properties conveyed by the said trust indenture above referred to, and fixed and determined the value of the said properties in the sum of $249,751.29, including the said value in the computation of the gross estate of the decedent, and thereby increased in a like amount the value of the net estate of the said Adolphus C. Bartlett, deceased, for the purpose of the assessment of the said estate tax.

19. That thereupon the said Commissioner of Internal Revenue, on or about the 1st day of May, 1924, did assess an additional tax, computed on the inclusion in the gross estate of the decedent of the above-mentioned value of the properties above referred to, and also the value of certain other properties elsewhere referred to, which additional tax as assessed on all such properties amounted to the sum of $314,993.93, of which total amount the sum of $44,955.23 represented the additional tax assessed as the result of the inclusion in the gross estate of the decedent of the properties referred to and conveyed by the said trust indenture.

20. That it adopts for the purposes of this count of this declaration, with like effect as though they were set up in full herein, the following numbered paragraphs of the first count of this declaration: Numbers 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, and 32, except that the said paragraphs shall here be read with reference to the facts set up in this count of this declaration; and which said paragraphs contain the allegations concerning the notice, demand, and payment of the said additional tax, the claim for refund, the denial of the Commissioner of Internal Revenue of the claim for refund, and the averments of the plaintiff that the said property should not be taxed, all of which will more specifically appear by reference to said paragraphs.

By reason whereof the said defendant became liable, and is bound by law to refund and pay to the plaintiff the amount so paid of $44,955.23, with interest thereon, according to the statute made and provided.

Fifth Count

For that whereas the plaintiff alleges:

1. That it adopts, for the purposes of this count in this declaration, the following numbered paragraphs as found in the first count hereof, with like effect as though they were set up in full herein, that is to say, paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11, except

that the said paragraphs shall here be read with reference to the facts set up in this count of this declaration.

12. The said Adolphus C. Bartlett during his lifetime, and in and by a certain indenture of trust bearing date the first day of March, 1919, transferred and conveyed to the Northern Trust Company, a corporation authorized to accept and execute trusts under the laws of the State of Illinois, and having its principal place of business in the city of Chicago, county of Cook, and State of Illinois, as trustee, certain properties more specifically described in the said instrument, which said indenture of trust, for the purposes of identification, bears the number of the Northern Trust Company, No. 4481.

That on, to wit, the 28th day of June, 1921, by an instrument in writing, the said trust indenture was, in accordance with the powers therein contained, amended in certain particulars, which will more specifically appear from the said instrument of amendment. And the said trust indenture and the amendment thereto above spoken of were in words and figures as follows:

This indenture, made this first day of March, in the year of our Lord one thousand nine hundred and nineteen (A. D. 1919),
56 by and between Adolphus C. Bartlett, of the city of Chicago, county of Cook, and State of Illinois, the party of the first part, and the Northern Trust Company, of Chicago (hereinafter termed the "trustee"), a corporation organized and doing business under the laws of the State of Illinois, the party of the second part, witnesseth:

Article First

The party of the first part, being desirous of establishing and creating the trust hereinafter mentioned, for the purposes and upon the terms set forth, in consideration of the premises and influenced by love and affection for the beneficiary hereinafter named, does hereby sell, assign, transfer, and set over unto the trustee the following securities, to wit:

300 shares of the stock of the First National Bank of Chicago;
200 shares of the stock of the Elgin National Watch Company;
200 shares of the stock of the Commonwealth Edison Company;
100 shares of the common stock of the Chicago & Northwestern Railway Company;
10 bonds of the Central Manufacturing Company, of the par value of $1,000 each;
25 bonds of the United States of America (known as fourth Liberty loan bonds), of the par value of $1,000 each;

to be held and disposed of under and in pursuance of the terms of this indenture.

Article Second

The trustee shall have power and authority at any time, and from time to time—

(1) To receive and collect all dividends declared and paid upon any shares of stock at any time subject to the terms of this agreement, and the interest upon all moneys, bonds, or obligations at any time held by it hereunder, and also all rents and other income which shall accrue or become due and payable on or from any of the trust estate hereunder.

(2) To sell, transfer, assign, and convey any or all of the stocks, bonds, obligations, securities, real estate, or other property held
57 at any time by said trustee under this instrument, and to invest and reinvest the proceeds thereof in either real or personal property, including dividend-paying stocks of corporations; provided, however, that during the life of said party of the first part said trustee shall be governed by any instructions or directions given to it in writing by said party of the first part in regard to the management, sale, or investment of any part of said trust estate, and said trustee shall be free from any liability or responsibility for any action by it done under or in pursuance of any such written directions or instructions. In no event shall any purchaser from the trustee, or any person or corporation dealing with the trustee, be required to ascertain the authority and power of the trustee to make any sale, conveyance, or transfer of any part of the trust estate held hereunder, but every such purchaser and all other parties shall be entitled to rely upon the delivery of the transfer, assignment, or conveyance by the trustee of any or all of said trust estate as having been in all respects fully authorized, and shall not be affected by any notice to the contrary, or be required to see to the application of the purchase money.

(3) To exercise the voting power upon all shares of stock held by the trustee hereunder, and to exercise every power, election, and discretion, give every notice, make every demand, and do every act and thing in respect of any shares of stock or bonds, or other obligations and securities held by the trustee hereunder, which it might or could do if it were the absolute owner thereof; provided, however, that upon the written request of said first party it shall be the duty of the trustee to execute, or cause to be executed, to the person or persons named in such request a proxy, entitling him or them (with full power of substitution) to vote in respect of any shares of stock in such written request or proxy defined and mentioned, at any meeting or meetings of the stockholders of any corporation or corporations specified in such request and proxy.

(4) To receive any and all stock dividends declared, and any other distribution which may be made by any corporation, any of whose shares of stock at any time constitute a part of the principal of the

trust estate, and also all proceeds which may be paid on or in respect of any such shares of stock on the liquidation of the company issuing the same, or upon the sale (whether voluntary or involuntary) of its assets, or any part thereof, or which may be otherwise paid out
58 of capital or on account of the principal of any bond, stock, or other security; and may in its discretion join in any plan of reorganization or of readjustment of any corporation, any of whose shares of stock, bonds of other securities or obligations may at any time constitute a part of the principal of the trust estate, and accept the substituted securities in and by said plan allotted in respect of the securities and obligations so held by the trustee.

(5) To execute leases of any real estate which shall form a part of the said trust at any time at such rental, and upon such terms, and for such length of time (not exceeding two hundred (200) years) as it may deem best; to erect buildings, or to change, alter, or make additions to any existing buildings upon any real estate which may form a part of said trust estate; and to do all other acts in relation to the said real estate which in the judgment of said trustee shall be needful or desirable to the proper and advantageous management thereof, so as to protect the same and make the same productive; provided, however, that in every case the said trustee shall observe and be governed by any instructions or request in relation thereto made by an instrument in writing, signed by said first party.

Article Third—Distribution and application of income

The term "net income" as used in this indenture shall be held to mean and include all sums received by the trustee by way of dividends, interest, or rents from the trust estate or any part thereof, after making any and all deductions therefrom in this instrument provided for or required by law. Such net income as and when received by the trustee shall be applied and disposed of by the trustee as follows:

(1) During the lifetime of said party of the first part said net income shall be accumulated and added to the principal of said trust estate; provided, however, that such payments out of said net income as may be approved or directed in writing by the said party of the first part shall be made from time to time to the daughter of said party of the first part, Florence Dibell Bartlett, or to the guardian of her surviving issue in the event of her death during the life of said party of the first part.

(2) From the death of said party of the first part the net in-
59 come of said trust estate shall be paid over to the said Florence Dibell Bartlett, the daughter of said party of the first part, for and during her life, or until the termination of the trust, as hereinafter provided.

Article Fourth.—Distribution of principal of trust estate

The trust hereby created shall terminate at the expiration of five (5) years from the death of the said party of the first part; provided, however, that if the said Florence Dibell Bartlett shall die prior to the expiration of said five (5) years, then and in that case said trust shall terminate at the death of the survivor of the said party of the first part and the said Florence Dibell Bartlett. And upon the termination of said trust the said trust estate shall be paid over to Florence Dibell Bartlett if she shall be then living and if she shall not be then living said trust estate shall be held, distributed, and disposed of in accordance with the provisions of the last will and testament of said Florence Dibell Bartlett. And in case said Florence Dibell Bartlett shall not dispose of said trust estate by her last will and testament then said trust estate shall be distributed and paid over to the surviving issue of said Florence Dibell Bartlett per stirpes, and in default of such surviving issue then the same shall be distributed and paid over to the surviving issue of said party of the first part per stirpes.

Article Fifth.—Concerning the trustee

The trustee hereby accepts the trust created by this indenture and agrees to act in accordance with its terms and provisions.

The trustee may consult with counsel and shall be fully protected in any action or nonaction taken, permitted, or suffered by it in good faith and in accordance with the opinion of counsel selected or provided by it; and in case of legal proceedings involving the trustee or the trust estate, the trustee may defend such proceedings and may, upon being advised by counsel that such action is necessary or advisable for the protection of the interests of the trustee, or of the beneficiaries, institute any legal proceedings.

60 The trustee shall be reimbursed and indemnified against any and all liability, loss, or expense because of the holding of any shares of stock or other properties constituting a part of the principal of the trust estate, either in its own name or in the name of a nominee, and shall have a lien upon the principal of the trust estate and the income therefrom for the amount of any liability, loss, or expense which may be so incurred by it, including the expense of defending any action or proceeding instituted against it or such nominee by reason of any such holding.

Out of the income of the principal of the trust estate the trustee shall pay all taxes, assessments, or other governmental charges which it may be required to pay or to retain because or in respect of any part of the principal of the trust estate or the income therefrom or the interest of the trustee therein, or the interest of any beneficiary or other person therein, under any present or future law of the United States, or of any State, county, municipality, or other taxing author-

ity therein, any and all such taxes, assessments, or other governmental charges lawfully imposed being charged as a lien upon the said income, and in case of deficiency of said income upon the principal of the trust estate.

The said trustee, or any successor in trust, may resign at any time by giving notice in writing of such resignation to said first party while he shall live, and after his death by giving notice in writing of such resignation to the beneficiary hereinbefore named.

In case of the resignation of any trustee acting hereunder, or of its disability or incapacity to further act as trustee, said party of the first part, if living, and after his death the said Florence Dibell Bartlett, shall have power to appoint a successor in trust by an instrument in writing, delivered to said trustee, and upon the appointment of such successor in trust the said trustee shall sell, convey, assign, and deliver to such successor in trust all of the trust estate then in its hands, and thereupon and thereafter such successor in trust shall have all the rights, powers, duties, and authority which were granted to or imposed upon said original trustee under the provisions of this indenture.

61 Article Sixth—Miscellaneous provisions

(1) Said grantor has created the foregoing trust to provide for the support and maintenance of the beneficiaries entitled to share in the income of said trust estate, and the said beneficiaries shall have no power to anticipate, assign or otherwise dispose of or encumber their respective interests in said trust estate, and the same shall not be subject to be taken from them by process of law.

(2) Any of the provisions in this trust deed may be altered, changed, or modified in any respect and to any extent, at any time, by an instrument in writing signed by the said party of the first part and by the said Florence Dibell Bartlett, and delivered to the trustee; and after the date of any such modification or alteration this indenture as so modified or altered shall be in force and govern the rights and powers of all parties concerned, the same in all respects as though such original indenture had been executed in such modified or altered form.

In witness whereof the parties hereto have executed this instrument, under seal, the day and year first above written.

(Signed) Adolphus C. Bartlett. [seal.]
The Northern Trust Company,
By Solomon A. Smith, *President.*

Attest:
H. H. Rockwell,
Asst. Secretary.

AMENDMENT OF JUNE 28, 1921

To the NORTHERN TRUST COMPANY, of Chicago, as trustee.

You are hereby notified that we, the undersigned, Adolphus C. Bartlett and Florence Dibell Bartlett (the said Adolphus C. Bartlett being the grantor and party of the first part, said The Northern Trust Company as trustee being the grantee and party of the second part, and the said Florence Dibell Bartlett being the beneficiary, in a certain trust indenture dated the 1st day of March, 1919), do
62 hereby, in pursuance of the power in us vested by the terms of said trust indenture, alter, change, and modify the provisions of said trust indenture by striking out the whole of the third article of said trust indenture and inserting in lieu thereof, as a part of said trust indenture, the following:

"Article Third—Distribution and application of income

"The term 'net income' as used in this indenture shall be held to mean and include all sums received by the trustee by way of interest, dividends or rents from the trust estate, or any part thereof, after making any and all deductions therefrom in this instrument provided for or required by law. Such net income, as and when received by the trustee, shall be applied and disposed of by the trustee as follows:

"The beneficiaries entitled to ask for and receive the said net income shall be Florence Dibell Bartlett during her life, and in the event of her death, leaving issue her surviving, the guardian of such issue shall be entitled to receive said net income, and in default of any such surviving issue then from the date of such default the surviving issue of said party of the first part, per stirpes, shall be entitled to receive said net income. So much of the net income as the beneficiary or beneficiaries entitled thereto shall ask for during each year shall be paid over to her or them, and the remainder thereof not paid over to the beneficiary or beneficiaries in each calendar year shall be added to and become a part of the principal of said trust estate at the end of each calendar year."

In witness whereof we, the undersigned, have hereunto set our hands and seals this 28th day of June, A. D. 1921.

ADOLPHUS C. BARTLETT. [SEAL.]
FLORENCE DIBELL BARTLETT. [SEAL.]

In presence of—
DOYLE E. HINTON.
ROBERT O. BURLEY.

STATE OF WISCONSIN,
County of Walworth, ss:

I, Annie F. Napper, a notary public in and for said county, in the State aforesaid, do hereby certify that Adolphus C. Bartlett,
63 personally known to me to be the same person whose name is

subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said instrument as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 28th day of June, A. D. 1921.

ANNIE F. NAPPER,
Notary Public.

My commission expires April 27, 1924.

STATE OF WISCONSIN,
County of Walworth, ss:

I, Annie F. Napper, a notary public in and for said county, in the State aforesaid, do hereby certify that Florence Dibell Bartlett, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that she signed, sealed, and delivered the said instrument as her free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 28th day of June, A. D. 1921.

ANNIE F. NAPPER,
Notary Public.

My commission expires April 27, 1924.

13. That it adopts for the purposes of this count of this declaration, with like effect as though they were set up in full face herein, the following numbered paragraphs of the first count of this declaration: Numbers 13, 14, 15, 16 and 17, except that the said paragraphs shall here be read with reference to the facts set up in this count of this declaration; and which said paragraph contain allegations that the said transfer was not made in contemplation of the death of the grantor, or to take effect in possession or enjoyment at or after his death; that the grantor retained no beneficial interest in the property so conveyed, and exercised no dominion or power over it, and that in filing its estate tax return the plaintiff did not include the said property in its computation of the gross value of the estate, but did give in the said return the full information concerning the said transfer, all of which will more specifically appear by a reference to said paragraphs.

64 18. That thereafter the Commissioner of Internal Revenue conducted an investigation of the said return of the plaintiff as said executor, of the value of the net estate of Adolphus C. Bartlett, deceased, and of the value of the properties conveyed by the said trust indenture above referred to, and fixed and determined the value of the said properties in the sum of $297,350.04, included the said value in the computation of the gross estate of the decedent, and thereby increased in a like amount the value of the net

estate of the said Adolphus C. Bartlett, deceased, for the purpose of the assessment of the said estate tax.

19. That thereupon the said Commissioner of Internal Revenue, on or about the 1st day of May, 1924, did assess an additional tax, computed on the inclusion in the gross estate of the decendent of the above mentioned value of the properties above referred to, and also the value of certain other properties elsewhere referred to, which additional tax as assessed on all such properties amounted to the sum of $314,293.93, of which total amount the sum of $53,523.01 represented the additional tax assessed as the result of the inclusion in the gross estate of the decedent of the properties referred to and conveyed by the said trust indenture.

20. That it adopts for the purposes of this count of this declaration, with like effect as though they were set up in full herein, the following numbered paragraphs of the first count of this declaration: Number 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31 and 32, except that the said paragraphs shall here be read with reference to the facts set up in this count of this declaration; and which said paragraphs contain the allegations concerning the notice, demand and payment of the said additional tax, the claim for refund, the denial of the Commissioner of Internal Revenue of the claim for refund, and the averment of the plaintiff that the said property should not be taxed, all of which will more specifically appear by reference to said paragraphs.

By reason whereof the said defendant became liable, and is bound by law, to refund and pay to the plaintiff the amount so paid of $53,523.01, with interest thereon, according to statute made and provided.

65 SIXTH COUNT

For what whereas the plaintiff alleges:

1. That it adopts for the purposes of this count in this declaration the following numbered paragraphs found in the first count hereof, with like effect as though they were set up in full herein, that is to say, paragraphs numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11, except that the said paragraphs shall here be read with reference to the facts set up in this count of this declaration.

12. That the said Adolphus C. Bartlett during his lifetime, and on or about the 11th day of February, 1903, and in and by a certain indenture of trust bearing the said date, transferred and conveyed to the Northern Trust Company, a corporation authorized to accept and execute trusts under the laws of the State of Illinois, and having its principal place of business in the city of Chicago, county of Cook, and State of Illinois, as trustee, certain properties, more specifically described in the said instrument. The said indenture of trust, for purposes of identification, bears the number of the Northern Trust Company, Number 1831, and was in words and figures as follows:

Know all men by these presents, that I, Adolphus C. Bartlett of Chicago, Illinois, do hereby give, assign, and transfer unto the Northern Trust Company (a corporation of said city of Chicago), three hundred and sixty (360) shares of the capital stock of the Illinois Central Railroad Company, in trust for the following uses and purposes, to wit:

1st. To collect the dividends thereon, so long as I shall live, and to pay said dividends to me, or to my order, during my lifetime.

2nd. After my death to collect the dividends upon said stock and pay the same to my daughter, Florence D. Bartlett.

3rd. After my death to transfer and assign to *to* said Florence D. Bartlett one-half of said stock, if and when she shall attain the age of thirty years, and to assign and transfer to said Florence D. Bartlett the remainder of said stock if and when she shall attain the age of thirty-five years.

4th. In case said Florence D. Bartlett shall die before receiving all of said stock as above provided, then and in such case, after my death, and upon the death of said Florence D. Bartlett, to transfer said stock then held by said trustee to the person or persons
66 whom said Florence D. Bartlett shall bequeath the same in and by her last will and testament, and in default of such bequest then to her heirs at law.

5th. Said trustee shall have the right, at its discretion, to sell said stock and invest the proceeds thereof in such other dividend-bearing or interest-bearing securities as it shall deem best, and to hold and apply the same, as trustee, in the same manner as hereinbefore provided regarding said stock.

6th. In case for any reason I shall elect, during my lifetime, to receive back said stock, or other securities in which the proceeds thereof may have been invested by said trustee, or any part or portion of said stock or other securities, I reserve the right to have said stock, or its equivalent, or any part or portion thereof retransferred to me, and to cancel the trust hereby created relative thereto, either in whole or in part, and to possess and enjoy said stock and its equivalent, or any part or portion thereof, as though this trust had not been created.

In witness whereof I have hereunto set my hand and seal this eleventh (11th) day of February, A. D. 1903.

(Signed) ADOLPHUS C. BARTLETT. [SEAL.]

The Northern Trust Company (an Illinois corporation) hereby acknowledges receipt of the shares of stock specified in the foregoing instrument, to wit, three hundred sixty (360) shares of the capital stock of the Illinois Central Railroad Company, and accepts the trust relative thereto set forth in the foregoing instrument.

THE NORTHERN TRUST COMPANY,
By ARTHUR HEURTLEY,
Its Secretary.

Executed in duplicate.

13. That the said indenture of trust having been executed and delivered on or about the date it bears, to wit, the 11th day of February, 1903, and long before the revenue act of 1921, above referred to, became effective on the 23rd day of November, 1921, the said Federal estate-tax statute, in so far as it provides for a tax upon the transfer made prior to the passage of the said statute, was unconstitutional and void.

14. That the plaintiff in filing its said estate-tax return, as aforesaid, did include in its computation of the gross value of the said estate the value of the properties conveyed, as aforesaid, to the Northern Trust Company as trustee under the said
67 indenture above set out, and stated therein the value of the said properties to be $44,194.50, thereby increasing the net estate a similar amount, and the tax upon the said transfer was in the sum of $7,955.04, which was included in the aforementioned sum of $225,197.01, and was paid to the defendant herein on the 29th day of May, 1923, by the plaintiff, under compulsion and in fear of the penalties provided in the said statute.

15. That it adopts for the purposes of this count of this declaration, with like effect as though they were set up in full herein, the following numbered paragraphs of the first count in this declaration: Numbers 24, 25, 26, 27, 28, 29, 30, and 31, except that the said paragraphs shall here be read with reference to the facts set up in this count of this declaration; and which said paragraphs contain allegations concerning the claim for refund, and the denial by the Commissioner of Internal Revenue of refund of the said claim, all of which will more specifically appear by reference to the said paragraphs.

By reason whereof the said defendant became liable, and is bound by law, to refund and pay to the plaintiff the amount so paid, $7,955.04, with interest thereon, according to the statute made and provided.

Seventh Count

For that whereas the plaintiff alleges:

1. That it adopts for the purposes of this count in this declaration the following numbered paragraphs found in the first count hereof, with like effect as though they were set up in full herein, that is to say, paragraphs numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11, except that the said paragraphs shall here be read with reference to the facts set up in this count of this declaration.

12. That the said Adolphus C. Bartlett during his lifetime, and on or about the 30th day of December, 1910, and in and by a certain indenture of trust bearing the said date, transferred and conveyed to the Northern Trust Company, a corporation authorized to accept and execute trusts under the laws of the State of Illinois, and having its principal place of business in the city of Chicago, county of
68 Cook, and State of Illinois, as trustee, certain properties, more specifically described in the said instrument. The said indenture of trust, for purpose of identification, bears the number of the

Northern Trust Company, Number 3048, and was in words and figures as follows:

This indenture, made and executed this 30th day of December, 1910, by Adolphus C. Bartlett, witnesseth:

That said Adolphus C. Bartlett, for and in consideration of one dollar in hand paid and other good and valuable consideration, the receipt whereof is hereby acknowledged, does hereby transfer, assign, and convey unto the Northern Trust Company, a corporation duly organized under and by virtue of the laws of the State of Illinois, as trustee—

20 bonds, par value $1,000 each, of the Chicago City Railway Company;

20 bonds, par value $1,000 each, of the J. I. Case Threshing Machine Company;

30 bonds, par value $1,000 each, of the American Telephone & Telegraph Company;

25 bonds, par value $1,000 each, of Morris & Company;

15 bonds, par value $1,000 each, of the Chicago, Lake Shore & Eastern Railway Company;

to have and to hold the same subject to the following trusts, purposes and conditions, to wit:

During the period of trusteeship as hereinafter fixed said Trust Company shall hold, manage, care for and protect said trust fund and collect the income and principal therefrom, all in accordance with its best judgment and discretion. Any part of the trust estate that may be converted into cash shall be invested in bonds, stocks, real estate mortgages, or other income-producing securities, either within or without the State of Illinois, said trustee to have as wide latitude in the selection and making of any investments as if it as an individual were the sole owner of said trust estate; provided, however, that during the life of said Adolphus C. Bartlett no investments shall be made without his approval. Said trustee is hereby given full power to sell and convey any or all of said trust property or any reinvestment thereof from time to time for such prices and upon such terms as it shall see fit, either for the purpose of reinvestment or of carrying out any provisions of this trust, and the purchaser or purchasers shall not be obliged to see to the application of the purchase money; provided, however, that during the life of said Adolphus C. Bartlett no sales shall be made without his approval.

69 Said trustee shall be reimbursed out of the trust estate for the reasonable and proper expenditures made or incurred by it in managing the trust and shall also be entitled to reasonable compensation out of the income from said trust estate for its services hereunder.

The entire net income shall be paid to said Adolphus C. Bartlett during his life and from and after his death such entire net income or so much thereof as the trustee thinks best shall be paid to Eleanor C. Bartlett, daughter of said Adolphus C. Bartlett, until she reaches

the age of fifty (50) years, at which time or upon the death of Adolphus C. Bartlett in case she shall then have reached the age of fifty (50) years, the entire principal of the trust estate shall be transferred and assigned to her to be her absolute estate forever. In case the trustee should be of the opinion that any portion of the income should not be paid to my said daughter then such portion of the income shall be accumulated and be added to the principal of the trust estate, such accumulation not to last more than twenty-one (21) years from the date of this instrument, after which time the entire net income shall be paid to my said daughter. In case of the death of said Eleanor C. Bartlett before receiving the principal of said trust estate then upon her death, in case such death occurs after the death of Adolphus C. Bartlett, or upon the death of Adolphus C. Bartlett in case her death occurs prior to his, the principal of the trust estate shall be distributed in accordance with the provisions of her last will and testament, any disposition by will of her estate to be regarded as an exercise of this power of appointment, and in case she should fail to provide for such distribution by last will and testament then the same shall be distributed among her heirs at law as the same may be ascertained by the laws of descent of the State of Illinois in force at the time of distribution.

Said Adolphus C. Bartlett hereby expressly reserves the right of revoking this instrument and each and every trust hereby created, either in whole or in part, by notice in writing to the trustee, and in case of such revocation said trust fund or the portion thereof as to which this indenture may be revoked shall be conveyed by said trustee to said Adolphus C. Bartlett, to be held by him freed from all trusts herein contained.

In witness whereof said Adolphus C. Bartlett has hereunto set his hand and seal and said The Northern Trust Company, to evidence its acceptance of the trusts, has caused its name to be signed by its duly authorized officer the day and year first above written.

ADOLPHUS C. BARTLETT. [SEAL.]
THE NORTHERN TRUST COMPANY,
By ARTHUR HEURTLE,
As Its Secretary.

STATE OF ILLINOIS,
County of Cook, ss:

I, William S. Miller, a notary public in and for the county and State aforesaid, do hereby certify that Adolphus C. Bartlett, personally known to me to be the same person who subscribed the foregoing instrument, appeared before me this day in person and acknowledged that he executed the said instrument as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 30th day of December, 1910.

WILLIAM S. MILLER,
Notary Public.

13. That the said indenture of trust was executed and delivered at or about the date it bears, as above set out, that is to say, on, to wit, the 30th day of December, 1910, and long before the revenue act, above referred to, became effective on the 23d day of November, 1921; that the said Federal estate-tax statute, is so far as it provides for a tax upon the transfer made prior to the passage of the said statute, was unconstitutional and void.

14. That the plaintiff in filing its said estate-tax return, as aforesaid, did include in its computation of the gross value of the said estate the value of the properties conveyed, as aforesaid, to the Northern Trust Company as trustee, under the said indenture above set out, and stated therein the value of the said properties to be $104,109.12, thereby increasing the net estate by a similar amount; and the tax upon the said transfer was in the sum of $18,738.02, which was included in the aforementioned sum of $225,407.01, and was paid to the defendant herein on the 29th day of May, 1923, by the plaintiff, under compulsion and in fear of the penalties provided for in the said statute.

15. That it adopts for the purposes of this count of this
71 declaration, with like effect as though they were set up in full herein, the following numbered paragraphs of the first count in this declaration: Numbers 24, 25, 26, 27, 28, 29, 30, and 31, except that the said paragraphs shall here be read with reference to the facts set up in this count of this declaration; and which said paragraphs contain allegations concerning the claim for refund, and the denial by the Commissioner of Internal Revenue of refund of the said claim, all of which will more specifically appear by reference to the said paragraphs.

By reason whereof the said defendant became liable, and is bound by law, to refund and pay to the plaintiff the amount so paid, $18,738.02, with interest thereon, according to the statute made and provided.

FOURTH COUNT

For that whereas the plaintiff alleges:

1. That it adopts for the purposes of this count in this declaration the following numbered paragraphs as found in the first count hereof, with like effect as though they were set up in full herein, that is to say, paragraphs numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10, except that the said paragraphs shall be read with reference to the facts set up in this count of this declaration.

11. That the revenue act of 1921, heretofore referred to, which was in full force and effect at the date of the death of the said Adolphus C. Bartlett, imposed a tax upon decedent's net estate, and provided that the said net estate should be determined by deducting from the decedent's gross estate certain allowances provided for in the said statute.

And the said statute further provided as follows:

"SEC. 402. That the value of the gross estate of the decedent, shall be determined by including the value at the time of his death of all property, real or persons, tangible or intangible, wherever situated—

"(a) * * *.

"(b) * * *.

"(c) * * *.

"(d) * * *.

"(e) * * *.

"(f) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own

72 Life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life."

12. That the said Adolphus C. Bartlett, long prior to the passage of the revenue act above referred to, and at various times during his life, secured policies of insurance on his life, named the beneficiaries therein, and from time to time paid the premiums thereon.

13. That of the said policies of insurance which were in force at the time of his death the said Adolphus C. Bartlett specified the beneficiaries in the policies below listed and retained to himself during his lifetime the right to change the said beneficiaries; that at the time of the death of the said Adolphus C. Bartlett the said policies were payable, and were in fact paid direct, to the beneficiaries named therein, and were not payable, and were not in fact paid, to the executor of the said Adolphus C. Bartlett, or to his estate.

The said policies, and their principal sums, the dates of issue, the beneficiaries named, and principal provisions contained were as follows:

(a) Policy No. 586283, the Mutual Benefit Life Ins. Co., dated December 21, 1911; beneficiary, Maie Bartlett Heard $5,000.00

(b) Policy No. 486405, the Mutual Benefit Life Ins. Company, dated December 22, 1908; beneficiary, Maie B. Heard 5,000.00

(c) Policy No. 267089, Phoenix Life Insurance Co., of Hartford, Conn., dated December 21, 1911; beneficiary, Maie B. Heard 5,000.00

(d) Policy No. 1954164, the Mutual Life Insurance Company, of New York, dated December 21, 1911; beneficiary, Maie B. Heard 5,000.00

(e) Policy No. 1954166, the Mutual Life Insurance Company, of New York, dated December 21, 1911; beneficiary, Maie B. Heard 5,000.00

(f) Policy No. 486407, the Mutual Benefit Life Insurance Company, of Newark, N. J., dated December 22, 1908; beneficiary, Eleanor C. Bartlett. The beneficiary after her marriage became Eleanor Bartlett Perdue, and thereafter, on January 20, 1919, the name of the beneficiary was accordingly changed to Eleanor Bartlett Perdue 5,000.00

73 (g) Policy No. 267082, the Phoenix Mutual Life Insurance Company, of Hartford, Conn., dated December 21, 1911; beneficiary, Eleanor C. Bartlett. The beneficiary after her marriage became Eleanor Bartlett Perdue, and thereafter, on January 20, 1919, the name of the beneficiary was accordingly changed to Eleanor Bartlett Perdue 5,000.00

(h) Policy No. 586286, the Mutual Benefit Life Ins. Company, dated December 21, 1911; beneficiary, Eleanor C. Bartlett. The beneficiary after her marriage became Eleanor Bartlett Perdue, and thereafter, on January 20, 1919, the name of the beneficiary was accordingly changed to Eleanor Bartlett Perdue 5,000.00

(i) Policy No. 1954178, the Mutual Life Insurance Company, of New York, dated December 21, 1911; beneficiary, Eleanor C. Bartlett. The beneficiary after her marriage became Eleanor Bartlett Perdue, and thereafter, on January 30, 1919, the name of the beneficiary was accordingly changed to Eleanor Bartlett Perdue $5,000.00

(j) Policy No. 1954176, the Mutual Life Insurance Company, of New York, dated December 21, 1911; beneficiary, Eleanor C. Bartlett. The beneficiary after her marriage became Eleanor Bartlett Perdue, and thereafter, on January 30, 1919, the name of the beneficiary was accordingly changed to Eleanor Bartlett Perdue 5,000.00

(k) Policy No. 267088, the Phoenix Mutual Life Ins. Company, of Hartford, Conn., dated December 21, 1911; beneficiary, Abby H. Bartlett 5,000.00

(l) Policy No. 588082, the Mutual Benefit Life Ins. Company, dated December 21, 1911; beneficiary, Abby H. Bartlett 5,000.00

(m) Policy No. 496404, the Mutual Benefit Life Ins. Company, dated December 22, 1908; beneficiary, Abby H. Bartlett 5,000.00

(n) Policy No. 1954169, the Mutual Life Insurance Company, of New York, dated December 21, 1911; beneficiary, Abby H. Bartlett 5,000.00

(o) Policy No. 1954162, the Mutual Life Insurance Company, of New York, dated December 21, 1911; beneficiary, Abby H. Bartlett 5,000.00

74 (p) Policy No. 1954168, the Mutual Life Insurance Company, of New York, dated December 21, 1911; beneficiary, Frederic C. Bartlett 5,000.00

(q) Policy No. 1954170, the Mutual Life Insurance Company, of New York, dated December 21, 1911; beneficiary, Frederic C. Bartlett 5,000.00

(r) Policy No. 588084, the Mutual Benefit Life Ins. Company, dated December 21, 1911; beneficiary, Frederic C. Bartlett 5,000.00

(s) Policy No. 496408, the Mutual Benefit Life Ins. Company; beneficiary, Frederic C. Bartlett 5,000.00

(t) Policy No. 267080, the Phoenix Mutual Life Insurance Company, of Hartford, Conn., dated December 21, 1911; beneficiary, Frederic C. Bartlett 5,000.00

(u) Policy No. 267091, the Phoenix Mutual Life Insurance Company, of Hartford, Conn., dated December 21, 1911; beneficiary, Florence D. Bartlett 5,000.00

(v) Policy No. 1954172, the Mutual Life Insurance Company, of New York, dated December 21, 1911; beneficiary, Florence D. Bartlett 5,000.00

(w) Policy No. 1954174, the Mutual Life Insurance Company, of New York, dated December 21, 1911; beneficiary, Florence D. Bartlett 5,000.00

(x) Policy No. 588085, the Mutual Benefit Life Insurance Company, dated December 21, 1911; beneficiary, Florence D. Bartlett 5,000.00

(y) Policy No. 211549, Mutual Life Insurance Company, of New York, dated June 18, 1880; beneficiary, Adolphus C. Bartlett, guardian for his son, Frank D. Bartlett; beneficiary changed by assignment dated February 18, 1919, to Frederic C. Bartlett, Maie Bartlett Heard, and Florence D. Bartlett, share and share alike 2,000.00

(z) Policy No. 496406, the Mutual Benefit Life Insurance Company, of Newark, New Jersey, dated December 22, 1908; beneficiary, Florence D. Bartlett 5,000.00

14. That the plaintiff, in filing its estate-tax return, as aforesaid, did include in the computation of the gross value of the said
75 estate the sum of $122,000, which represented all of the aforementioned principal sums of the said policies of life insurance, excepting policy No. 496406 of the Mutual Benefit Life Insurance Company, of Newark, New Jersey, in the amount of $5,000, referred

to above as item (z), and thereby increased the said net estate a similar amount and paid a tax thereon of $21,960, which said tax was included in the aforementioned sum of $225,407.01, and paid by the plaintiff to the defendant on the 29th day of May, 1923, under compulsion and in fear of the penalties provided in said act.

15. That thereafter the Commissioner of Internal Revenue conducted an investigation of the said return of the plaintiff as said executor of the value of the net estate of Adolphus C. Bartlett, deceased, and included in the computation of the gross estate of the decedent the aforementioned principal sum of $5,000 named in policy No. 496406 of the Mutual Benefit Life Insurance Company, referred to above as item (z), and thereby increased by a like amount the value of the net estate of the said Adolphus C. Bartlett, deceased, as determined for the purpose of the assessment of the so-called estate tax.

16. That thereupon the said Commissioner of Internal Revenue, on or about the 1st day of May, 1924, did assess an additional tax computed on the inclusion in the gross estate of the decedent of the abovementioned principal sum of policy No. 496406 of the Mutual Benefit Life Insurance Company for $5,000, and also the value of certain other properties elsewhere referred to, which additional tax as assessed on all such properties amounted to $314,393.93, of which total amount the sum of $900 represented the additional tax assessed as the result of the inclusion in the gross estate of the decedent of the principal sum of the said policy referred to above as item (z).

17. That it adopts for the purpose of this count of this declaration, with like effect as though they were set up in full herein, the following numbered paragraphs of the first count of this declaration: Numbers 20, 21, 22, 24, and 25, except that the said paragraphs shall here be read with reference to the facts set up in this count of this declaration; and which said paragraphs contain allegations concerning the demand of the Commissioner of Internal Revenue for additional tax, and notice thereof; the payment of the said additional tax to the plaintiff by the defendant; the inclusion in the additional tax of the tax on the insurance in question; the claim for re-
76 fund filed by the plaintiff with the defendant; the denial by the Commissioner of Internal Revenue of the claim for refund, all of which will more specifically appear by reference to the said paragraphs.

18. That the said estate-tax law, being an act of Congress approved November 23, 1921, and entitled "An Act to reduce and equalize taxation, to provide revenue, and for other purposes," is unconstitutional and void in so far as it purports to tax the estate of the decedent by including in the said estate the amount of insurance above referred to and received by other beneficiaries than the estate of the decedent. And the said provisions of the statute in connection therewith are contrary to the provisions of the Constitution of the United States, that no capitation or other assessment shall be laid unless in proportion to the census enumeration, and also contrary to

the provisions of the Constitution of the United States to the effect that no person shall be deprived of property without due process of law, and that the said provisions of the said law are in violation of the limitations on the taxing power of Congress, to the effect that no tax shall be so arbitrary, unreasonable, and unfairly apportioned among those under like circumstances as to amount to a confiscation of property.

19. That even if the said tax law aforesaid is found to be constitutional, no part of the said insurance on the life of Adolphus C. Bartlett payable and in fact paid to others than his estate is, as ought to be, considered a portion of the estate of the deceased, Adolphus C. Bartlett, taxable under the terms of the said act.

By reason whereof the said defendant became liable and is bound by law to refund and pay to the plaintiff the amount so paid, namely, $22,800, with interest thereon, according to the statute made and provided.

CONCLUSION

Nevertheless the defendant, although often requested, has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiff; but to pay the same or any part thereof to the said plaintiff the said defendant hath hitherto refused and still does refuse, to the damage of the said plaintiff in the sum of $300,000, and therefore the said plaintiff brings suit, etc.

WILSON, MCILVAINE, HALE AND TEMPLETON,
Attorneys for the Plaintiff.

STUART I. TEMPLETON,
J. F. DAMMANN, JR.,
Of Counsel.

77 STATE OF ILLINOIS,
County of Cook, ss:

A. B. Caswell, being first duly sworn, deposes and says that he is the 2nd vice president of The Northern Trust Company, an Illinois corporation; that said The Northern Trust Company is executor under the last will and testament, and codicil thereto, of Adolphus C. Bartlett, deceased, and that he is duly authorized to make this affidavit in behalf of said The Northern Trust Company, and in its behalf as executor as aforesaid; that the demand of the plaintiff in the above-entitled cause is for the return and repayment of an internal revenue tax illegally assessed and collected from the plaintiff as an estate tax in connection with the estate of the said Adolphus C. Bartlett, deceased, and paid by said plaintiff to said defendant under protest, the grounds of illegality being set forth in the above and foregoing declaration, which is hereby made a part hereof, and that there is now due from the defendant to the plaintiff, after allowing all its just credits and set-offs, the sum of three hundred and forty-

seven thousand three hundred and sixty-six dollars and ninety-nine cents ($347,366.99), with interest from the dates of the said payments until repaid.

A. B. CASWELL.

Subscribed and sworn to before me this 11th day of May, 1925.

[SEAL.] FRANK G. GRADY,
Notary Public.

[File endorsement omitted.]

In United States District Court

Demurrer

Filed October 7, 1925

And the defendant, Mabel G. Reinecke, collector of internal revenue of the United States of America for the first district of Illi-
78 nois, by Edwin A. Olson, United States attorney, her attorney, comes and defends, etc., when, and says that the declaration and the matters therein contained in manner and form as the same are above set forth are not sufficient in law for the plaintiff to maintain his aforesaid action, and that she, the defendant, is not bound by law to answer the same, and this she is ready to verify.

Wherefore for want of a sufficient declaration in this behalf the defendant prays judgment, and that the plaintiff may be barred from maintaining his aforesaid action, etc.

EDWIN A. OLSON,
United States Attorney,
Attorney for Defendant.

[File endorsement omitted.]

In United States District Court

Stipulation

Filed October 7, 1925

It is stipulated and agreed, by and between the parties to this suit, through their respective attorneys, that the eighth count of the plaintiff's declaration heretofore filed may be dismissed.

(Signed) WILSON, MCILVAINE, HALE & TEMPLETON,
Attorneys for Plaintiff.

(Signed) EDWIN A. OLSON,
United States Attorney,
Attorney for the Defendant.

[File endorsement omitted.]

79 In United States District Court

Order dismissing eighth count of declaration

Oct. 7, 1925

On stipulation of the parties to this suit filed herein it is ordered that this suit be, and the same is hereby, dismissed as to the eighth count in plaintiff's declaration filed in said cause.

In United States District Court

Orders continuing hearing

Thursday, October 15, 1925

Upon motion it is ordered that the defendant's demurrer to the plaintiff's declaration filed in said cause be, and the same is hereby, set for hearing November 16th, A. D. 1925.

Monday, November 16, 1925

On agreement of the parties to this suit now here made in open court it is ordered that the hearing on the defendant's demurrer to the plaintiff's declaration filed in said cause be, and the same is hereby, continued to November 23rd, A. D. 1925.

80 Monday, November 23, 1925

On motion it is ordered that leave be, and the same is hereby, given the defendant to file brief within ten days and plaintiff to file reply brief within ten days thereafter and defendant to file reply brief within twenty days thereafter.

Friday, December 11, 1925

On motion of plaintiff's attorneys it is ordered that the time within which the plaintiff is to file briefs be, and the same is hereby, extended to January 11th, A. D. 1926.

It is further ordered that the time to file reply brief be, and the same is hereby, extended thirty days thereafter.

81 Wednesday, January 13, 1926

On motion of plaintiff's attorneys it is ordered that leave be, and the same is hereby, given the plaintiff to file instanter briefs herein.

In United States District Court

Order overruling demurrer

December 13, 1926

This cause coming on to be heard upon the defendant's demurrer to the plaintiff's declaration filed in said cause and after arguments

of counsel and due deliberation by the court said demurrer is overruled.

It is further ordered that the defendant be and is hereby required to plead to the plaintiff's declaration filed in said cause within thirty days from this date.

82 In United States District Court

Demurrer

Filed Jan. 12, 1927

I

And the defendant, by Edwin A. Olson, United States district attorney, her attorney, comes and defends, etc., when, etc., and says that the said first count of the said declaration, and the matters therein contained, in manner and form as the same are above set forth, are not sufficient in law for the plaintiff to maintain its aforesaid action, and that she, the defendant, is not bound by law to answer the same; and this she is ready to verify.

Wherefore for want of a sufficient first count of said declaration in this behalf the defendant prays judgment and that the plaintiff may be barred from maintaining its aforesaid action, etc.

II

And the defendant, by Edwin A. Olson, United States district attorney, her attorney, comes and defends, etc., when, etc., and says that the said second count of the said declaration, and the matters therein contained, in manner and form as the same are above set forth, are not sufficient in law for the plaintiff to maintain its aforesaid action, and that she, the defendant, is not bound by law to answer the same; and this she is ready to verify.

Wherefore for want of a sufficient second count of said declaration in this behalf the defendant prays judgment and that the plaintiff may be barred from maintaining its aforesaid action, etc.

III

And the defendant, by Edwin A. Olson, United States district attorney, her attorney, comes and defends, etc., when, etc., and says that the said third count of the said declaration, and the matters therein contained, in manner and form as the same are above set forth, are not sufficient in law for the plaintiff to maintain its aforesaid action, and that she, the defendant, is not bound by law to answer the same; and this she is ready to verify.

Wherefore for want of a sufficient third count of said dec-
83 laration in this behalf the defendant prays judgment and that the plaintiff may be barred from maintaining its aforesaid action, etc.

IV

And the defendant, by Edwin A. Olson, United States district attorney, her attorney, comes and defends, etc., when, etc., and says that the said fourth count of the said declaration, and the matters therein contained, in manner and form as the same are above set forth, are not sufficient in law for the plaintiff to maintain its aforesaid action, and that she, the defendant, is not bound by law to answer the same; and this she is ready to verify.

Wherefore for want of a sufficient fourth count of said declaration in this behalf the defendant prays judgment and that the plaintiff may be barred from maintaining its aforesaid action etc.

V

And the defendant, by Edwin A. Olson, United States district attorney, her attorney, comes and defends, etc., when, etc., and says that the said fifth count of the said declaration, and the matters therein contained, in the manner and form as the same are above set forth, are not sufficient in law for the plaintiff to maintain its aforesaid action, and that she, the defendant, is not bound by law to answer the same; and this she is ready to verify.

Wherefore for want of a sufficient fifth count of said declaration in this behalf the defendant prays judgment and that the plaintiff may be barred from maintaining its aforesaid action, etc.

VI

And the defendant, by Edwin A. Olson, United States district attorney, her attorney, comes and defends, etc., when, etc., and says that the said sixth count of the said declaration, and the matters therein contained, in manner and form as the same are above set forth, are not sufficient in law for the plaintiff to maintain its aforesaid action, and that she, the defendant, is not bound by law to answer the same; and this she is ready to verify.

Wherefore for want of a sufficient sixth count of said declaration in this behalf the defendant prays judgment and that the plaintiff may be barred from maintaining its aforesaid action, etc.

VII

And the defendant, by Edwin A. Olson, United States district attorney, her attorney, comes and defends, etc., when, etc., and says that the said seventh count of the said declaration, and the matters therein contained, in manner and form as the same are above set forth, are not sufficient in law for the plaintiff to maintain its aforesaid

action, and that she, the defendant, is not bound by law to answer the same; and this she is ready to verify.

Wherefore for want of a sufficient seventh count of said declaration in this behalf the defendant prays judgment and that the plaintiff may be barred from maintaining its aforesaid action, etc.

EDWIN A. OLSON,
United States Attorney,
Attorney for Defendant.

[File endorsement omitted.]

In United States District Court

Judgment

March 25, 1927

This cause coming on to be heard upon the demurrer to the plaintiff's declaration, and each count thereof, filed in said cause, and after arguments of counsel and due deliberation of the court said demurrer to the said declaration, and each count thereof, is overruled, to which defendant excepts.

Whereupon the said defendant elects to stand by her said demurrer.

Wherefore the plaintiff ought to have and recover of and from
85 the defendant its damages sustained herein by reason of the premises, to which defendant excepts.

Thereupon reference is had to the court to assess the plaintiff's damages herein; and the court now here, after hearing all the allegations and proofs submitted herein by the plaintiff, and being fully advised in the premises, assesses the plaintiff's damages in the sum of three hundred sixty-seven thousand fifty-two dollars and two cents ($367,052.02), to which defendant excepts.

Therefore it is considered by the court that the plaintiff do have and recover of any from the defendant its said damages of three hundred sixty-seven thousand fifty-two dollars and two cents ($367,052.02) in form as aforesaid by the court assessed, to which defendant excepts.

Enter.

CARPENTER, *Judge.*

In United States District Court

Certificate of probable cause

March 31, 1927

The court hereby finds and certifies that there was probable cause for the acts done by the collector of internal revenue in collecting the

taxes for the recovery of which judgment in the above-entitled cause has been entered.

Enter.

CARPENTER, *Judge.*

86 In United States District Court

Petition for writ of error

Filed May 27, 1927

To the Honorable GEORGE A. CARPENTER,
Judge of the District Court, Aforesaid.

Mabel G. Reinecke, collector of internal revenue for the first district of the State of Illinois, defendant in the above-entitled cause, feeling herself aggrieved by the judgment entered on the 25th day of March, A. D. 1927, comes now by George E. Q. Johnson, United States attorney for the Northern District of Illinois, on her behalf and by direction of the Attorney General of the United States, and petitions said court for an order allowing said defendant to prosecute a writ of error, for the correction of the errors complained of, to the honorable United States Circuit Court of Appeals for the Seventh Circuit, under and according to the laws of the United States in that behalf made and provided.

GEORGE E. Q. JOHNSON,
United States Attorney for the Northern District of Illinois, Eastern Division.

Dated at Chicago, Illinois, May 25th, 1927.

[File endorsement omitted.]

In United States District Court

Assignment of errors

Filed May 27, 1927

Now comes George E. Q. Johnson, United States attorney for the Northern District of Illinois, and by direction of the Attorney General of the United States, is about to petition for a writ of error from the decision and judgment of this court rendered on the 25th day of March, A. D. 1927, in the above-entitled cause, and for the defendant assigns the following errors of law from the said decision and judgment:

87 1. That the District Court of the United States for the Northern District of Illinois, Eastern Division, erred in overruling the demurrer of the defendant to the declaration of the plaintiff.

2. That the said court erred in overruling defendant's demurrer to plaintiff's declaration and to each count thereof.

3. That the said court erred in finding the issues for the plaintiff and against the defendant.

4. That the said court erred in entering judgment against the defendant and in favor of the plaintiff.

Wherefore plaintiff in error prays that the judgment of said court be reversed.

GEORGE E. Q. JOHNSON,
United States Attorney.

Dated at Chicago, Illinois, May 25th, 1927.

[File endorsement omitted.]

In United States District Court

Order allowing writ of error

May 27, 1927

On motion of defendant, by George E. Q. Johnson, United States attorney for the Northern District of Illinois, and upon filing the petition for writ of error and assignment of errors:

It is thereupon ordered that a writ of error be, and the same is, hereby allowed, to have reviewed in the United States Circuit Court of Appeals for the Seventh Circuit, the judgment entered herein on the 25th day of March, A. D. 1927, and that citation issue returnable thirty days from this date.

Enter.

CARPENTER, *Judge.*

88 In United States District Court

Writ of error and return

Filed May 27, 1927

UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the Judges of the District Court of the United States for the Northern District of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between the Northern Trust Company, as executor under the last will and testament of A. C. Bartlett, deceased, vs. Mabel G. Reinecke, collector of internal revenue for the first district of Illinois, a manifest error hath happened, to the great damage of the said Mabel G. Reinecke, collector of internal revenue for the first district of Illinois, as by her complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do com-

mand you, if judgment be therein granted, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Seventh Circuit, together with this writ, so that you have the same in the said United States Circuit Court of Appeals for the Seventh Circuit at Chicago within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Seventh Circuit may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Wm. Howard Taft, Chief Justice of the United States, the 27th day of May, in the year of our Lord one thousand nine hundred and 27.

CHARLES M. BATES,
Clerk of the District Court of the United States
for the Northern District of Illinois.

Allowed by—
CARPENTER, *Judge.*

89 NORTHERN DISTRICT OF ILLINOIS, *ss:*

In obedience to the within writ I herewith transmit to the United States Circuit Court of Appeals for the Seventh Circuit a true and complete transcript of the record and proceedings in the foregoing entitled cause this 7th day of June, A. D. 1927.

[SEAL.] CHARLES M. BATES,
Clerk United States District Court,
Northern District of Illinois.

[File endorsement omitted.]

In United States District Court

Precipe for transcript of record

To CHARLES M. BATES,
Clerk of the District Court of the United States
for the Northern District of Illinois, Eastern Division.

You are hereby requested to make a transcript of the record to be filed in the United States Circuit Court of Appeals for the Seventh Circuit, pursuant to a writ of error allowed in the above entitled cause, and to include in such transcript of record the following papers, to wit:

1. Placita.
2. Precipe filed May 12, 1925.
3. Process.
4. Declaration.
4. Return on process.
6. Demurrer of defendant filed October 7, 1925.
6½. Stipulation filed October 7, 1925.

7. Order entered on October 7, 1925, pursuant to stipulation, dismissing the eighth count of the declaration.

8. Order entered on October 15, 1925, setting demurrer to declaration for hearing on November 16, 1925.

9. Order entered on November 16, 1925, continuing hearing on demurrer to November 23, 1925.

10. Order entered on November 23, 1925, directing defendant to file brief in ten days, plaintiff to file reply brief ten days thereafter, and defendant to file reply brief twenty days thereafter.

90 11. Order entered on December 11, 1925, continuing time for plaintiff to file reply brief to January 11, 1926, and time for defendant to file reply brief extended to thirty days thereafter.

12. Order entered on January 13, 1926, granting plaintiff leave to file reply brief instanter.

13. Order entered on December 13, 1926, overruling demurrer to declaration and giving defendant leave to plead in thirty days.

14. Demurrer filed on January 12, 1927.

15. Order entered on May 25, 1927, overruling demurrer to declaration, together with exceptions thereto, and judgment for the plaintiff for $367,052.02.

16. Order of certificate of probable cause entered on March 31, 1927.

17. Petition for writ of error.

18. Order of May 27th, 1927, allowing writ of error.

19. Assignment of errors.

20. Citation.

21. Writ of error.

22. Praecipe for transcript of record.

GEORGE E. Q. JOHNSON,
United States Attorney.

Dated at Chicago, Illinois, this 28th day of May, A. D. 1927.

[Clerk's certificate to foregoing transcript omitted in printing.]

91 [Citation in usual form showing service on F. J. Koch, filed June 6, 1927, omitted in printing.]

92 [Title omitted.]

[Appearances of counsel omitted in printing.]

93 In United States Circuit Court of Appeals

Court opened by proclamation of crier.

Present: Hon. Evan A. Evans, Circuit Judge, presiding; Hon. George T. Page, Circuit Judge; Hon. Albert B. Anderson, Circuit Judge; Edward M. Holloway, clerk; Palmer E. Anderson, marshal.

MABEL G. REINECKE, Collector, etc.	Error to the District Court of the United States for the Northern District of Illinois, Eastern Division
3928 vs.	
THE NORTHERN TRUST CO., Executor, etc.	

Order setting cause

October 4, 1927

It is ordered by the court that this cause be, and the same is hereby, set down for hearing on Thursday, November 10, 1927.

94 [Minute entry of argument and submission Nov. 10, 1927, omitted in printing.]

95 In the United States Circuit Court of Appeals

[Title omitted.]

Opinion

December 12, 1927

Before EVANS, PAGE, and ANDERSON, Circuit Judges

Opinion by PAGE, Cir. J.: After the collector of internal revenue, defendant (plaintiff in error), elected to abide by her demurrer to the plaintiff's (defendant in error's) declaration, the plaintiff, executor of the will of A. C. Bartlett, who died May 30, 1922, was awarded a judgment for that part of the tax collected from the executor, under the revenue act of 1921, because the Government had included as a part of the gross estate of decedent the property covered by five trusts created in 1919, one in 1915, and one in 1916.

96 Defendant states the questions involved as follows:

1. Were the trusts created by Adolphus C. Bartlett intended to take effect in possession or enjoyment within the meaning of section 402 (c) of the revenue act of 1921 (42 U. S. Stats. at L., p. 277)?

2. Can Congress include in a decedent's gross estate the value of property conveyed by a revocable trust instrument prior to September 8, 1916?

3. Can Congress include in a decedent's gross estate the value of property conveyed after September 8, 1916, by a trust instrument which is revocable by the settlor acting jointly with a majority of the beneficiaries?

Defendant contends for an affirmative answer to each.

In each of the trusts there was an absolute transfer and conveyance of the property to the trustee.

Under the first of the 1919 trusts the income was to be paid to the wife and children until the period of distribution of the corpus, after the death of the settlor. The settlor reserved the right (1) to supervise the reinvestment of the trust funds; (2) to require the trustee to execute such proxies for voting stocks transferred as he might wish; (3) to control all leases made; (4) jointly with the majority of the beneficiaries, to alter, change, or modify the terms of the trust.

The other four 1919 trusts were severally made for the benefit of a child of the settlor. As drawn, they provided for the accumulation of the whole income until the period of distribution of the corpus, after the death of the settlor, except so much thereof as the settlor might, from time to time, direct to be paid to the beneficiary named. By amendments made on June 28, 1921, in the manner provided in the trust instruments, the beneficiary under each was to be paid the income. The corpus of the trust fund went to the beneficiary or to his heirs or devisees, and, in default of such heirs or devisees, it went to the issue of the settlor.

All the 1919 trusts gave very full powers to the trustee. The last four contained the same reservations as the first as above set out.

In the 1903 trust it was provided that the income was to be paid to the settlor for life, then to a daughter until the termination of the trust. The corpus was to be paid to the daughter, or in the
97 event of her death before distribution it was to go in much the same manner as provided in the 1919 trusts.

Except that another daughter is the beneficiary, the 1910 trust is identical with the 1903 trust. In each the settlor reserved the right of revocation.

The relevant portions of the statute are as follows:

"SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * * * *

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title." (42 U. S. Stats. L. p. 277; sec. 6333¾c, U. S. Compiled Stats., 1923 Supp.)

The argument that the trusts were "intended to take effect in possession or enjoyment" within the meaning of the statute is based upon three facts disclosed in the 1919 trusts: (a) That the income was in whole or in part to be accumulated until after the settlor's death; (b) that the corpus was to be distributed after his death; (c) that the trusts were revocable by the joint act of the settlor and a majority of the beneficiaries.

As to the 1903 and 1910 trusts, the argument for an affirmative answer is based upon the provisions found in those trusts: (a) That the settlor took the whole income for life; (b) that the corpus was

to be distributed after his death to the beneficiary named in the trust; (c) that the trusts were revocable at the will of the settlor.

The decisions of the District Courts and the Courts of Appeal, which have considered section 402 (c), are not in harmony
98 with respect to transfers not intended to take effect until after the death of the settlor, and we are of opinion that more discussion will not help to solve the riddle.

No question of intention to evade a tax is here urged. We are of opinion that the reservations in the 1919 trusts, as above herein enumerated, must be held to be reasonable and prudent provisions which in no way affect or defeat the real purposes of the trusts. The settlor, by those reservations, took nothing for himself, but each reservation is a pledge on his part of advice and assistance to the trustee for the benefit of the beneficiaries.

Our views harmonize with those expressed by the Supreme Court in Shukert v. Allen (— U. S. —), decided March 21, 1927, and we feel that they are decisive of the case under the 1919 trusts, and that their terms do not bring those trusts within the provisions of section 402 (c). The court there said:

"It seems to us tolerably plain, that when the grantor parts with all his interest in the property to other persons in trust, with no thought of avoiding taxes, the fact that the income vested in the beneficiaries was to be accumulated for them instead of being handed to them to spend, does not make the trust one intended to take effect in possession or enjoyment at or after the grantor's death."

Even if it be conceded that the 1903 and 1910 trusts were conveyances intended to take effect in possession or enjoyment at or after the settlor's death, then, on the authority of Nichols v. Coolidge (— U. S. —), decided May 31, 1927, we must hold adversely to defendant's contention as to those trusts. It was there held:

"And we must conclude that section 402 (c) of the statute here under consideration, in so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious, and amounts to confiscation."

The 1903 and 1910 trusts were created many years before there was any statute of the kind here involved, and under the authority of Jones v. Clifton (101 U. S. 225), we hold that the title and the possession of the property passed out of the settlor, and that as
99 the right to revoke was not a property right in him there was nothing that passed from the settlor, at his death, either to the beneficiaries or the trustees.

The judgment is affirmed.

100 In United States Circuit Court of Appeals

[Title omitted.]

Judgment

Dec. 12, 1927

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

101 In United States Circuit Court of Appeals

Stipulations and orders staying mandate

It is hereby stipulated by and between the parties to the above-entitled cause, by their respective attorneys, that the mandate in the above-entitled cause may be stayed until January 16, A. D. 1928.

J. F. Dammann, Jr.,
Stuart J. Templeton,
Attorneys for Defendant in Error.
George E. Q. Johnson,
A. W. Gregg,
Attorneys for Plaintiff in Error.

[Endorsed:] Filed December 31, 1927. Edward M. Holloway, clerk.

Saturday, December 31, 1927

Pursuant to filing of stipulation of counsel it is now here ordered that the mandate of this court in this cause be, and the same is hereby, stayed until January 16, 1928.

102 STIPULATION

It is hereby stipulated and agreed by and between the parties to the above-entitled cause, by their respective attorneys, that the mandate in the above-entitled cause may be stayed until February 15, A. D. 1928.

J. F. Dammann, Jr.,
Stuart J. Templeton,
Attorneys for Defendant in Error.
George E. Q. Johnson,
A. W. Gregg,
Attorneys for Plaintiff in Error.

[Endorsed:] Filed January 16, 1928. Edward M. Holloway, clerk.

Monday, January 16, 1928

Pursuant to stipulation of counsel it is now here ordered that the mandate in this cause be, and the same is hereby, stayed until February 15, 1928.

103 STIPULATION

It is hereby stipulated by and between the parties to the above-entitled cause, by their respective attorneys, that the mandate in the above-entitled cause may be stayed to and including March 10, 1928.

J. F. DAMMANN, Jr.,
STUART J. TEMPLETON,
Attorneys for Defendant in Error.
GEORGE E. Q. JOHNSON,
A. W. GREBE,
Attorneys for Plaintiff in Error.

[Endorsed:] Filed February 15, 1928. Edward M. Holloway, clerk.

Wednesday, February 15, 1928

Pursuant to stipulation of counsel it is now here ordered that the mandate in this cause be, and the same is hereby, stayed until March 10, 1928.

104 [Certificates to foregoing transcript omitted in printing.]

105 Supreme Court of the United States

Order allowing certiorari

Filed April 23, 1928

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM, 1927

MABEL G. REINECKE, COLLECTOR OF INTERNAL REVENUE for the First District of Illinois, petitioner,

v.

THE NORTHERN TRUST COMPANY, AS EXECUTOR under the last will and testament of A. C. Bartlett, deceased.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General on behalf of Mabel G. Reinecke, Collector of Internal Revenue for the First District of Illinois, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Seventh Circuit entered in the above case on December 12, 1927, affirming the judgment of the United Stites District Court for the Northern District of Illinois.

QUESTION PRESENTED

Were certain trusts created by Adolphus C. Bartlett in his lifetime properly included in his

gross estate for Federal estate tax purposes under the provisions of Section 402 (c) of the Revenue Act of 1921?

The court below held that as to some of the trusts there was no intent on the part of Congress to include them in the gross estate, and as to others that although Congress did intend to include them it had no power under the Constitution to do so.

STATUTES INVOLVED

The Revenue Act of 1921 (c. 136, 42 Stat. 227, 277, 278), provides in part as follows:

> SEC. 401. That, in lieu of the tax imposed by Title IV of the Revenue Act of 1918, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States * * *. [Here follow the rates.]
>
> SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether

> such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; * * *.

STATEMENT

The facts of this case are disclosed by the declaration (R. 4–76), and are as follows:

Adolphus C. Bartlett died May 30, 1922. (R. 4.) Prior to his death he created seven trusts. One of these trusts, known for the purpose of identification as Trust No. 4477 (R. 6), was created on March 1, 1919, and was not modified during the testator's lifetime. This trust provided (R. 7) that the trustees should collect the income from certain property transferred to them and out of the income pay to the settlor's wife $2,000 per month during the joint lives of the settlor and the wife (R. 9). The balance of the income during this period was to be accumulated. After the death of the settlor the wife is to be paid $2,000 per month during her lifetime or until she shall become entitled to a share in the decedent's estate, and the balance of the income is to be paid equally to the four children of the settlor or to the issue of such children as

may die. (R. 9, 10.) The trust is to terminate five years after the donor's death or at the death of the wife, whichever shall last occur. (R. 10.) At the time the trust terminates the corpus is to be distributed to the settlor's children or to the then surviving issue of such children, or in default of such issue and children, to the surviving issue of the settlor. (R. 10.)

The settlor reserved the right (1) to supervise the reinvestment of the trust funds (R. 7, 8); (2) to require the trustees to execute such proxies for voting stocks transferred as he may wish (R. 8); (3) to control all leases made (R. 9); (4) jointly with the majority of the beneficiaries to alter, change, or modify the terms of the trust (R. 12); and (5) to appoint a successor trustee in the case of resignation or incapacity of the trustee (R. 11). The trust provides that the beneficiaries shall have no power to "anticipate, assign, or otherwise dispose of or encumber their respective interests in said trust estate, and the same shall not be subject to be taken from them by process of law." (R. 12.)

Trust No. 4478 (R. 26) is identical with Trusts Nos. 4479 (R. 35), 4480 (R. 45), and 4481 (R. 55), except as to the beneficiaries. These four trusts were created on March 1, 1919, and were amended in certain particulars on June 28, 1921. (R. 32, 42, 52, 61.) As created they provide that the trustees shall receive and collect the income (R. 27, 37, 46, 56) and shall accumulate the same during the life of the donor except so much thereof as the donor

directs to be paid to the beneficiary or his issue, and after the death of the settlor the income shall be paid to the beneficiary for life or until the termination of the trust (R. 29, 39, 48, 58). The trust terminates five years after the settlor's death or at the death of the survivor of the beneficiary and settlor. (R. 29, 39, 49, 59.) At the time of the termination of the trust the corpus is to be distributed to the beneficiary or to his appointees under his last will and testament, or if no such appointees then to the surviving issue of the beneficiary, or in default of such surviving issue then to the surviving issue of the settlor. (R. 29, 39, 49, 59.) The same powers were retained by the donor as were retained in Trust deed No. 4477, except that the right to modify was exercisable only in conjunction with the single beneficiary. (R. 31, 41, 51, 61.) The same provision as to the anticipation by the beneficiary was made. (R. 31, 41, 51, 61.) These trusts were modified on June 28, 1921, so that thereafter the income, instead of being accumulated, was payable to the beneficiary or to the guardian of the issue of the beneficiary in such amounts as such beneficiary or guardian might ask for during the term of the trust. (R. 32, 42, 52, 61.)

Trust No. 1831 (R. 65) was created on February 11, 1903, and provided that the income from the trust fund should be paid to the settlor for life, and after the death of the settlor to the daughter, Florence D. Bartlett, until the termination of the trust. One-half of the corpus was to be paid to

the daughter when she reached the age of thirty years, the remainder to be paid to the daughter when she reached the age of thirty-five years (but in no case before the settlor's death). (R. 65.) If the daughter should die before receiving all the corpus, then the corpus, undistributed, was to be paid to the appointees of the daughter named by her last will and testament, in default of such appointee then to her heirs at law. (R. 65, 66.) *The settlor reserved the right to revoke this trust in whole or in part.* (R. 66.)

Trust No. 3048 (R. 68) was created on the 30th day of December, 1910, and in its terms is identical with Trust No. 1831, except that the beneficiary is another daughter and the distribution is to be made when such daughter reaches the age of fifty years. It is also provided that the trustee shall exercise his discretion in the amount of the income to be paid to the daughter during the term of the trust. (R. 69.)

From the foregoing it appears: That Trust No. 4477 provided that any of its provisions could be "altered, changed, or modified in any respect and to any extent" at any time during the life of the settlor by the delivery to the trustee of an instrument in writing signed by the settlor and a majority of the five beneficiaries. (R. 12.)

That Trusts Nos. 4478, 4479, 4480, 4481 each provided that any of its provisions could be "altered, changed, or modified in any respect and to any extent" at any time by an instrument in writing

signed by the settlor and the single beneficiary. (R. 31, 41, 51, 61.)

It also appears: That in Trust No. 1831 the settlor reserved "the right to have said stock, or its equivalent, or any part or portion thereof retransferred to me, and to cancel the trust hereby created relative thereto, either in whole or in part, and to possess and enjoy said stock and its equivalent, or any part or portion thereof, as though this trust had not been created." (R. 66.)

That in Trust No. 3048 the settlor reserved "the right of revoking this instrument and each and every trust hereby created, either in whole or in part, by notice in writing to the Trustee, and in case of such revocation said trust or the portion thereof as to which this indenture may be revoked shall be conveyed by said Trustee to said Adolphus C. Bartlett, to be held by him freed from all trusts herein contained." (R. 69.)

The value of the property transferred to the trustees of Trusts Nos. 4477, 4478, 4479, 4480, and 4481 was included in the value of the decedent's gross estate by the Commissioner of Internal Revenue under the provisions of the Revenue Act of 1921 (R. 13, 34, 44, 54, 64), on the theory that the trusts and transfers were intended to take effect in possession or enjoyment at or after the decedent's death. The respondent paid under protest and duress the tax assessed by reason of this inclusion (R. 19, 35, 44, 54), duly filed a claim for refund (R. 19, 35, 44, 54), which was rejected by the Com-

missioner (R. 22, 35, 44, 54), and brought this action to recover this tax.

In filing the estate tax return under the provisions of the Revenue Act of 1921 the value of the property transferred to the trustees of Trusts Nos. 1831 and 3048 was included by respondent in the value of the gross estate, and the tax thereon was paid under compulsion and in fear of the penalties provided in said statute. (R. 66-67, 70.) The claim for refund previously referred to included the tax computed upon these two trusts.

Demurrers to the declaration were filed by the defendant (R. 77, 82), which the court overruled (R. 81, 84), whereupon, the defendant refusing to plead further, judgment was entered against her. (R. 84.) This judgment was affirmed by the Circuit Court of Appeals.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred in holding that the trusts created in 1919 were not intended to take effect in possession or enjoyment at or after death, and further in holding that Congress had no power to include in the gross estate the property in the trusts created in 1903 and 1910, absolute power to revoke which had been reserved to the trustor.

REASONS FOR GRANTING THE WRIT

In the case of *Nichols* v. *Coolidge*, 274 U. S. 531, this Court held that Section 402(c) of the Revenue Act of 1918, which is identical with Section 402(c) of the Revenue Act of 1921, was unconstitutional

in so far as it attempted to include in a decedent's gross estate the value of property as to which the decedent had created, prior to September 8, 1916, an irrevocable trust on such terms that she retained no interest whatever in the property. In the case of *Shukert* v. *Allen*, 273 U. S. 545, this Court held that this section did not cover the case of a trust, under which the founder retained no interest in the trust property and under which the distribution of the corpus and termination of the trust were in no way related to the time of the founder's death. The question whether the retention of an interest in the trust property is necessary in order that the trust may come within the statute is, in view of the decision in the *Coolidge case*, doubtful.

The question whether revocability, when added to a postponement of enjoyment until after the founder's death, is sufficient to justify the inclusion of property subject to such a trust in the gross estate has not been passed upon by this Court. In two of the trusts the trustor reserved to himself absolute power to revoke them at any time. A further question arises in this case in connection with the trusts created in 1919. At the time these trusts were created there was an Act in effect making such transfers taxable. This Act, however, was amended and reenacted before the decedent died, so that there arises the question whether or not the power of Congress extends to the taxation of such trusts when they are created after the passage of the taxing Act, and if so whether the repeal and

reenactment of that Act operates to relieve the transfer from taxation.

These questions are of constant occurrence in the application of the estate tax law, and have given rise to much litigation which is now pending in various courts. They are of such a nature that the Circuit Court of Appeals in this case felt justified in saying "more discussion will not help to solve the riddle."

In order that the Bureau of Internal Revenue may have a rule for its guidance on a question touching the power of Congress to impose a tax, it is desirable that this Court review this case.

Similar cases are now pending in the Circuit Courts of Appeals for the Second Circuit (*Farmers' Loan & Trust Company* v. *Bowers*, 15 F. (2d) 706; the Third Circuit (*Fidelity Trust Company* v. *McCaughn*, 17 F. (2d) 605, and in the Sixth Circuit (*Stark* v. *United States*, 14 F. (2d) 616). These cases have not been decided and in all probability will not be decided until after the time within which an application for certiorari in this case can be made, so that it is impossible to await the result of those decisions to determine whether or not there will be a conflict.

Wherefore it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Seventh Circuit should be granted.

WILLIAM D. MITCHELL,
Solicitor General.

MARCH, 1928.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The District Court did not write an opinion. The opinion of the Circuit Court of Appeals has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 12, 1927. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT

A statement of the facts and of the errors relied on will be found in the petition.

ARGUMENT

After the decisions of this Court in the cases of *Nichols* v. *Coolidge*, 274 U. S. 531, and *Shukert* v. *Allen*, 273 U. S. 545, the Bureau of Internal Revenue modified its regulations so as to conform to those decisions. There were, however, certain cases not similar on the facts to those cases, and apparently not covered by the principles announced therein. The regulations, which are set out as an appendix to this brief, now provide for the inclu-

sion of trusts where the enjoyment of the remaindermen is expressly deferred until the founder's death and the trusts are either revocable and therefore not completed transactions until after the Act was passed, or else were taxable under a prior or existing Act in force at the time they were created.

The trust instruments involved in this case are of such a nature and were made at such times that they fall within the new regulations, and the case raises three questions which have not been decided by this Court. These questions are:

1. Whether the trusts were intended to take effect in possession or enjoyment within the meaning of Section 402 (c) of the Revenue Act of 1921;

2. If so, has Congress power to include in a decedent's gross estate the value of property with respect to which he has created a trust intended to take effect in possession or enjoyment at or after his death where the trust was revocable by the trustor and was created prior to the passage of the first Federal estate tax Act, to wit: September 8, 1916? This question arises in respect of Trusts Nos. 1831 and 3048. (R. 65, 68.)

3. Can Congress include in a decedent's gross estate the value of property with respect to which he has created a trust intended to take effect in possession or enjoyment at or after his death where the trust was created after September 8, 1916, but before the passage of the Act in effect at the time the decedent died and where it can be altered, changed or modified in any respect and to any ex-

tent by the founder acting jointly with a majority of the beneficiaries, or jointly with the single beneficiary in those trusts where there is only one? This question arises in respect of Trusts Nos. 4477, 4478, 4479, 4480, and 4481. (R. 6, 26, 35, 45, 55.)

The trusts created March 1, 1919, are all similar in that under none of them was the income payable to the settlor, but in all of them the corpus was to be distributed after the settlor's death. In this respect the trusts are like that involved in the case of *Nichols* v. *Coolidge*, 274 U. S. 531. In that case had the trust not been within the statutory language it would not have been necessary to have passed upon the constitutional question. Since the majority of the Court found it necessary to pass upon the constitutional question, it is arguable that the majority of this Court was of the opinion that such a trust was within the Act. This inference is strengthened by the recent decision in the case of *Saltonstall* v. *Saltonstall*, No. 144, October Term, 1927, decided February 20, 1928, not yet reported.

The remaining trusts are clearly within the language and spirit of the Act, since they provide for the payment of the income to the settlor for his life with power to revoke these trusts at any time.

McCaughn v. *Girard Trust Company*, 11 F. (2d) 520;

Farmers' Loan & Trust Company v. *Bowers*, 15 F. (2d) 706.

In the *Coolidge Case* the Court said (p. 543) that Congress had no power to include a trust "merely

because the conveyance was intended to take effect in possession or enjoyment at or after his (the founder's) death". Where, however, such a trust is revocable it is clear that the gift does not become final either as to the beneficiaries or as to the founder until he dies without revoking. *Saltonstall* v. *Saltonstall, supra.* The gift is, therefore, "ambulatory" and to all intents and purposes there is a "transfer" from the decedent to the beneficiaries at his death.

Farmers' Loan & Trust Company v. *Bowers, supra;*

Matter of Schmidlapp, 236 N. Y. 278.

Assuming that it is within the power of Congress to include transfers which are intended to take effect in possession or enjoyment at or after death when such transfers are made while an Act taxing such transfers is in effect, then with respect to the trusts made by this decedent in 1919, the question arises whether the repeal of such a taxing Act and its substantial reenactment by another Act so operates as to relieve from taxation those transfers which except for such repeal would have been taxed.

Bear Lake Irrigation Company v. *Garland,* 164 U. S. 1;

Lamb v. *Powder River Live Stock Company,* 132 Fed. 434;

Great Northern Railway Company v. *United States,* 155 Fed. 945;

Steamship Company v. *Joliffe,* 2 Wall. 450.

There is some power retained by the founder in each of the seven trusts here involved. In view of the decision in the *Saltonstall Case* it is quite plausible to say that the transfer is not complete until the power to revoke is destroyed by the death of the founder.

Whatever may be said about the other trusts, the reservation in two of an absolute power to the trustor to revoke at any time, presents a case which justifies consideration by this Court.

It is therefore respectfully submitted that the petition for certiorari should be granted.

WILLIAM D. MITCHELL,
Solicitor General.
C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.
T. H. LEWIS,
Special Attorney,
Bureau of Internal Revenue.

MARCH, 1928.

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APPENDIX

Reg. 63, Art. 19 (as amended by T. D. 4064, dated August 12, 1927):

> All transfers made by the decedent subsequent to September 8, 1916, other than bona fide sales for a fair consideration in money or money's worth which were intended to take effect in possession or enjoyment at or after his death, are taxable, and the value, as of the date of the decedent's death, of property or interest so transferred must be returned as part of the gross estate.
>
> Where a transfer (whether made before or after the passage of the Revenue Act of 1916) was intended to take effect in possession or enjoyment at or after the decedent's death, and the enjoyment of the property or the interest transferred was subject at the date of the decedent's death to change by the exercise of any power to alter, amend, or revoke, the value, as of the date of the decedent's death, of the property or interest so transferred must be returned as a part of the gross estate.

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 90

MABEL G. REINECKE, COLLECTOR OF INTERNAL REVENUE for the First District of Illinois, petitioner

v.

THE NORTHERN TRUST COMPANY, AS EXECUTOR UNDER the Last Will and Testament of A. C. Bartlett, Deceased

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS OF THE COURTS BELOW

The District Court did not write an opinion. The opinion of the Circuit Court of Appeals (R. 66) is reported in 24 F. (2d) 91.

GROUNDS OF JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 12, 1927. (R. 69.) Certiorari was granted April 23, 1928. (R. 70.) The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Do the words of Section 402 (c) of the Revenue Act of 1921, which provide that, for the purpose of measuring the estate tax, there shall be included in the value of decedent's gross estate trusts intended to "take effect in possession or enjoyment at or after his death," embrace:

(*a*) Trusts created prior to the effective date of the first Act (1916) levying a Federal estate tax, under which the settlor retains the income for his life and the absolute right to revoke the trust, and under which the corpus of the trust can not vest in the beneficiary until at or after the settlor's death. (This applies to Trusts Nos. 1831 and 3048, appearing in the record at pp. 47, 50.)

(*b*) Trusts created after the effective date of a similar and earlier Act, where the settlor reserved the power to sell and reinvest the trust property; vote the stock; control leases; reappoint trustees; and, jointly with the beneficiaries, to alter, amend, or modify the trust. (This applies to Trusts Nos. 4477, 4478, 4479, 4480, and 4481, respectively, appearing in the record at pp. 3, 17, 25, 32, 40.)

2. If the words of Section 402 (c) of the Revenue Act of 1921 do embrace all of these trusts, can that section constitutionally apply to the two trusts created before the first Federal estate tax law became

effective, but under which the settlor reserved the income and the absolute right to revoke? (This applies to Trusts Nos. 1831 and 3048.)

3. Where a trust has been created during the effectiveness of Section 402 (c) of the Revenue Act of 1918 and takes effect in possession or enjoyment at or after the death of the settlor, and during the effectiveness of Section 402 (c) of the Revenue Act of 1921 (an identical section), can its value be included in the gross estate of decedent under the latter section? (This applies to Trusts Nos. 4477, 4478, 4479, 4480, and 4481.)

STATUTES INVOLVED

The Revenue Act of 1921, c. 136, 42 Stat. 227, 277, 278, 321, provides in part as follows:

> SEC. 401. That, in lieu of the tax imposed by Title IV of the Revenue Act of 1918, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States * * *. (Here follow the rates.)
>
> SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof made by the decedent within two years prior to his death without such a consideration shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; • • •

SEC. 1403. That if any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby.

After the decisions of this Court in the cases of *Nichols* v. *Coolidge*, 274 U. S. 531, and *Shukert* v. *Allen*, 273 U. S. 545, the Bureau of Internal Revenue modified its regulations so as to conform to those decisions. There were, however, certain cases not similar on the facts to those cases and apparently not covered by the principles announced therein. The regulations, which are set out as an appendix to this brief, now provide for the inclusion

of trusts where the enjoyment of the remaindermen is expressly deferred until the founder's death and the trusts are either revocable, and therefore not completed transactions until after the Act was passed, or were taxable under a prior or existing Act in force at the time they were created.

STATEMENT OF THE CASE

The facts of this case, as disclosed by the declaration (R. 1–56), are as follows:

Adolphus C. Bartlett died May 30, 1922. (R. 1.) Prior to his death he created seven trusts. One of these trusts, known for the purpose of identification as Trust No. 4477 (R. 3), was created March 1, 1919, and was not modified during the testator's lifetime. This trust provided that the trustees should collect the income from certain property transferred to them and out of the income pay to the settlor's wife $2,000 per month during the joint lives of the settlor and the wife. (R. 5.) The balance of the income during this period was to be accumulated. After the death of the settlor the wife was to be paid $2,000 per month during her lifetime or until she should become entitled to a share in the decedent's estate, and the balance of the income was to be paid equally to the four children of the settlor or to the issue of such children as might die. (R. 5–6.) The trust was to terminate five years after the donor's death, or at the death of the wife, whichever should last occur. (R. 6.)

At the time the trust terminated the corpus was to be distributed to the settlor's children, or if any child be dead then his share was to go to his then surviving issue, or in default of such children and issue of children to the surviving issue of the settlor. (R. 6.) The settlor reserved the right: (1) To govern the management, sale, or investment of any part of the trust estate (R. 4); (2) to require the trustee to execute such proxies for voting stock as he might wish (R. 4); (3) to control all leases made and other acts done with respect to real estate belonging to the trust (R. 5); (4) to appoint a successor trustee in case of resignation or incapacity (R. 7); and (5) jointly with a majority of the beneficiaries to alter, change, or modify the terms of the trust (R. 7). The trust provided that the beneficiaries should have no power to "anticipate, assign, or otherwise dispose of or encumber their respective interests in said trust estate, and the same shall not be subject to be taken from them by process of law." (R. 7.)

Trust No. 4478 (R. 17) is identical with trusts Nos. 4479 (R. 25), 4480 (R. 32), and 4481 (R. 40), except as to the beneficiaries. These four trusts were created on March 1, 1919, and were amended in certain particulars on June 28, 1921. (R. 17, 25, 32, 40.) As created they provided that the trustee shall receive and collect the income (R. 18, 26, 33, 41), and after paying the expenses of the trust shall accumulate the net income during the lifetime of the donor except so much thereof as the donor shall direct to

be paid to the beneficiary or his issue and after the death of the settlor the income shall be paid to the beneficiary for life, or until the termination of the trust (R. 19, 27, 35, 42). The trust terminates five years after the settlor's death or at the death of the survivor of the beneficiary and settlor. (R. 20, 27, 35, 43.) At the termination of the trust the corpus is to be distributed to the beneficiary or to his appointees under his last will and testament, or if no such appointees, then to the surviving issue of the beneficiary, or, in default of such surviving issue, to the surviving issue of the settlor. (R. 20, 28, 35, 43.) The same powers were retained by the donor as were retained in Trust No. 4477 except the right to modify was exercisable only in conjunction with the single beneficiary. (R. 21, 29, 37, 44.) The same provision as to the anticipation by the beneficiary was made. (R. 21, 29, 36, 44.)

These trusts were modified on June 28, 1921, so that thereafter the income instead of being accumulated was payable to the beneficiary or to the guardian of the issue of such beneficiary in such amounts as such beneficiary or guardian, as the case might be, might ask for during the term of the trust. (R. 22, 30, 37, 45.)

Trust No. 1831 (R. 47) was created February 11, 1903, and provided that the income from the trust fund should be paid to the settlor for his life, and after his death to his daughter, Florence D. Bartlett, until the termination of the trust. One-half of the corpus was to be paid to the daughter when she

reached the age of thirty years, the remainder to be paid to her when she reached the age of thirty-five years (but in no case before the settlor's death). (R. 48.) If the daughter should die before receiving all the corpus then the corpus undistributed was to be paid to the appointees of the daughter named in her last will and testament, or in default of such appointment, then to her heirs at law. (R. 48.) This trust provides (R. 48):

> * * * I reserve the right to have said stock, or its equivalent, or any part or portion thereof retransferred to me, and to cancel the trust hereby created relative thereto, either in whole or in part, and to possess and enjoy said stock and its equivalent, or any part or portion thereof, as though this trust had not been created.

Trust No. 3048 (R. 50) was created December 30, 1910, and in its provisions is substantially identical with Trust No. 1831, except that the beneficiary is another daughter and the distribution is to be made when such daughter reaches the age of fifty years (but in no case before the settlor's death). This trust also provides that the said trustee shall exercise his discretion as to the amount of the income to be paid to the daughter during the term of the trust. (R. 50.)

The Commissioner of Internal Revenue added the value of the property transferred to the trustees of trusts numbered 4477, 4478, 4479, 4480, and 4481 to the value of the decedent's gross estate as returned

by the executors (R. 9, 24, 31, 39, 46), on the theory that the trusts and transfers were intended to take effect in possession or enjoyment at or after decedent's death. The respondent paid under protest and duress the tax assessed by reason of this addition. (R. 11, 24, 32, 39, 47, 52.)

In the return filed the executors included the value of the property transferred to the trustees of trusts numbered 1831 and 3048 and paid the tax thereon. (R. 49, 52.)

A claim for refund demanding the return of the tax paid on account of the inclusion of the value of the property covered by these seven trusts was duly filed by the respondent and rejected by the petitioner, whereupon this suit was instituted in the District Court for the Northern District of Illinois by declaration (R. 1), to which declaration the petitioner demurred (R. 59). The court overruled the demurrer and petitioner electing to stand on the demurrer, judgment was entered in favor of the respondent. (R. 61.) A writ of error was sued out from the Circuit Court of Appeals for the Seventh Circuit (R. 63), which court affirmed the judgment of the court below (R. 69). To review this judgment this Court granted certiorari on April 23, 1928. (R. 70.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred in holding that the trusts created in 1919 were not intended

to take effect in possession or enjoyment at or after death, and further in holding that Congress had no power to include in the gross estate the property in the trusts created in 1903 and 1910, absolute power to revoke which had been reserved to the settlor.

SUMMARY OF THE ARGUMENT

All of the trusts here under review were so drawn that the time at which the corpus of each vested in the beneficiary was measured from the death of the settlor, and as to each of them the settlor reserved certain control and either an unqualified (as to Trusts Nos. 1831 and 3048) or, a joint right with the beneficiaries (as to Trusts Nos. 4477, 4478, 4479, 4480, and 4481), to revoke. These fundamental differences distinguish this case from *Shukert* v. *Allen*, 273 U. S. 545, in which this Court held that irrevocable trusts which terminated at a time having no relation to the death of the settlor were not contemplated under Section 402 (c).

That the section was intended to embrace such trusts as those here present seems clearly indicated by its words. The words "in possession or enjoyment," to mean anything, must infer the additional words "of the corpus" for, to adopt the alternative inference that the section referred to the income would be to place a tax on something that is not only unusual but purely incidental. As this possession

or enjoyment is postponed until "at or after his (the settlor's) death," it can only refer to the possession or enjoyment of the beneficiary, which must be the equivalent of vesting in the beneficiary the corpus in actual possession or enjoyment at or after settlor's death. In the instant case, under all seven of the trusts, that is exactly true. It must follow, then, that the section applies to these trusts. This conclusion is strengthened by reference to the decision of this Court in *Nichols* v. *Coolidge*, 274 U. S. 531. In that case, which arose under an identical section of an earlier Act, and concerned a trust similar, so far as the time of vesting was concerned, to those here involved, this Court held the section, as to features hereinafter discussed, to be unconstitutional. The inference, then, is that the section did apply to the Coolidge trusts. If that is correct, the section here involved must apply to the instant trusts.

As to Trusts Nos. 1831 and 3048, created in 1903 and 1910, respectively, the settlor retained the income during his life and the unqualified right to revoke. The absence of these reservations in the Coolidge trusts impelled this Court to declare the section unconstitutional, in that it attempted to tax, at death, a transaction under which the settlor's interest had ceased prior to death, and which was not testamentary in effect. In the instant case the tax is measured, in fact, as of the time the settlor's

interest ceased, which was only at his death, and the transaction itself, was testamentary in effect.

That five of the instant trusts (Trusts Nos. 4477, 4478, 4479, 4480, and 4481) were created in 1919 while the Revenue Act of 1918 was in effect, and terminated by the death of the settlor while the Revenue Act of 1921 was in effect, is immaterial so far as the application of the rule of the *Coolidge case* is concerned. The reason of that rule is that it is unfair and confiscatory to make the inclusion (and thus the tax) apply to trusts created before there was any such tax. When these trusts were created, a section of the Revenue Act of 1918 identical with the one here invoked was in effect. The settlor created them with full notice of this. The repeal of an Act and its immediate reenactment does not destroy the old Act and create a new one, but the latter is but a continuation of the former. The element of surprise being here eliminated and Congress possessing the power to include trusts created subsequent to the Act, the unconstitutionality shown in the *Coolidge case* does not here exist.

Even were this not true, the reservations of interest retained by the settlor, of control and management, the right to vote stock, or, with others, to revoke the instrument, are sufficient to make inapplicable the rule of the *Coolidge case* to these trusts.

ARGUMENT

I

A TRUST, UNDER WHICH THE CORPUS CAN NOT BE DISTRIBUTED UNTIL AFTER THE DEATH OF THE SETTLOR, IS A TRUST "INTENDED TO TAKE EFFECT IN POSSESSION OR ENJOYMENT AT OR AFTER" THE DEATH OF SETTLOR, WITHIN THE MEANING OF SECTION 402 (c) OF THE REVENUE ACT OF 1921

It is believed that an analysis of all seven of the trusts presented in the instant case will demonstrate that they are of that class of trusts meant by Congress to be embraced within the terms of Section 402 (c) of the Revenue Act of 1921, *supra*.

While differences may exist in the terms of the particular trusts, which will be discussed hereafter in their relation to the final result, all seven of them are substantially alike in that in none of them can the corpus of the trust be distributed to the beneficiaries during the lifetime of the settlor.

Before undertaking an affirmative discussion of this issue, it would seem desirable to first dispose of the case of *Shukert* v. *Allen*, 273 U. S. 545. As the similarities which may seem apparent are only superficial that case may be readily distinguished. There this Court held that the trust involved did not come within the terms of Section 402 (c) of the Revenue Act of 1918, which is in identical language with the same section of the 1921 Act here under discussion. The distinctions between the

trust there and the seven trusts here are vital. In the *Shukert case* there was an absolute, indefeasible right vesting in the beneficiaries at once. In the instant case no such right was acquired. Under Trusts No. 1831 and 3048, the right of the settlor to revoke existed until his death; under Trusts No. 4477, 4478, 4479, 4480, and 4481, the right of the settlor, with the respective beneficiaries, to revoke also existed. In the *Shukert case* the trust terminated on a certain preestablished and definite date in no way connected with the death of the settlor. In the instant case in all of the trusts the transfer of the corpus to the beneficiary is dependent upon the death of the settlor.

As the Court in the *Shukert case* based its opinion on the presence there of two factors not existing here, it is submitted that the reasoning of that case is in no way applicable.

There would seem little doubt but that the words of the statute were intended to contemplate just such trusts as those here involved. The statute includes in the gross estate of decedents "any interest • • • with respect to which he has at any time created a trust, • • • intended to take effect in possession or enjoyment at or after his death."

The words "to take effect" when qualified as they are by the further words "in possession or enjoyment" can only mean to ripen from an interest under a trust into a full estate, and as this ter-

mination of the trust estate can only occur "at or after his death" it follows that the estate taking effect must be the estate of the beneficiary. It is equally obvious that the estate of the beneficiary intended must be the full estate coupled with a present enjoyment and unfettered by the trust relationship, as it must be "in possession or enjoyment." These latter words refer not to the income which may or may not be had prior to the settlor's death, nor to any technical or future or contingent title, but to the corpus of the estate actually possessed or enjoyed. This conclusion seems justified by the holding of this Court in *Vanderbilt* v. *Eidman*, 196 U. S. 480.

From the language used and the whole scheme of the statute what Congress obviously intended was to provide a measure for the tax which would operate equally upon all testamentary dispositions of property, whether by will or intestacy or only testamentary in effect.

It is submitted, then, that the statute can only be interpreted as applying to trusts which confer upon its beneficiaries vested or contingent remainders which merge into full estates, actually "in possession or enjoyment" "at or after his (the settlor's) death."

Applying this construction of the statute to the seven trusts in the case at bar, makes manifest the direct application of the section. In Trusts Nos.

1831 and 3048 the founder not only deprived the beneficiaries of the possession, enjoyment, and income of the trust property during his life, but also provided that the income should be paid to him. A somewhat similar trust was held to be within the purview of Section 402 (c) of the Revenue Act of 1918 in *McCaughn* v. *Girard Trust Company*, 11 F. (2d) 520. Further, the founder reserved the absolute and unrestricted right to revoke the trusts, thus depriving the beneficiary of any assured interest in the property at any time, and retaining complete dominion over the property. *Bullen* v. *State of Wisconsin*, 240 U. S. 625.

In the remaining five trusts (Trusts Nos. 4477, 4478, 4479, 4480, and 4481), although the founder did not reserve to himself the income from the trust property, he did retain a substantial control over the trust property, including a power, in conjunction with others, to revoke, which power was in four cases out of the five actually exercised. The determination of the classes in whom the remainder interests should vest could not be made until after the founder's death, so that until that time no member or prospective member of the class had any assured right or interest in the trust fund or one of which disposition could be made. Moreover, the interests which the life beneficiaries took under the trust instrument were not absolute rights to designated shares of the income with power to alienate in advance of payment. The income became the bene-

ficiary's absolute property only upon receipt by him, because the trust instruments provided that the beneficiaries should have no power to "anticipate, assign, or otherwise dispose of or encumber their respective interests" in these trusts.

This conclusion finds confirmation in a consideration of the opinion of this Court in *Nichols* v. *Coolidge*, 274 U. S. 531. In the *Coolidge case* the trust was similar to the instant ones save that it was there irrevocable. This Court, in view of the fact that the trust was created prior to the adoption of Section 402 (c) of the Revenue Act of 1918, held that section, so far as it attempted to reach back, to be unconstitutional.

That this Court considered the constitutionality of the section establishes a fair inference that it considered the trusts there involved to be within the purview of the section; for "a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401; *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 390; *Lewellyn* v. *Frick*, 268 U. S. 238, 251. As the section considered by the Court in the *Coolidge case* is identical with the one here involved, and as the trusts, so far as concerns the time in which they "take effect in possession or enjoyment," offer no material differences, it is submitted that the *Coolidge case* is strongly indicative of the

fact that the seven trusts here involved do come within the purview of Section 402 (c) of the Revenue Act of 1918.

As was said in the *Coolidge case* the power of Congress to include such transfers in an Act taxing transfers by death arises from the necessity of preventing evasion and is limited by that necessity. By the term "evasion" it is not intended to imply any moral turpitude. A transfer, however innocently made, which operates as a future disposition of property in fact, and regardless of the intent or the motive of the maker, evades the tax. Such transfers have the effect, through the creation of artificial estates, either of retaining in the settlor, during his life, an interest in or a dominion over the subject of the trust or of controlling the usage of property in the future. The right to create such estate is no more inherent than is the privilege of transmitting by death. See *Keeney* v. *New York*, 222 U. S. 525.

Congress enacted Section 402 (c) of the Revenue Act of 1921 to reach such artificial estates as are created by the trusts in the instant case, under which the settlor either retained the income during his life or a dominion over the trust property, and under which the corpus vested in the beneficiary only at or after the settlor's death.

II

CONGRESS HAS POWER TO INCLUDE IN A DECEDENT'S GROSS ESTATE THE VALUE OF PROPERTY IN RESPECT OF WHICH HE HAS CREATED A TRUST PRIOR TO THE PASSAGE OF THE ACT, RESERVING TO HIMSELF THE INCOME FOR LIFE AND AN UNRESTRICTED POWER OF REVOCATION

The settlor created Trust No. 1831 in 1903 (R. 47) and Trust No. 3048 in 1910 (R. 50), and under both of these trusts he reserved to himself without qualification the income during his life and the power to revoke.

In the *Coolidge case* this Court held that the presence in Section 402 (c) of the Revenue Act of 1918 of the clause "(whether such transfer or trust is made or created before or after the passage of this Act)" brought trusts created prior to the passage of the Act within its terms. It then declared the Act to be unconstitutional as to those trusts which had been created prior to the passage of the Act.

The same clause appears in the section here under consideration and is manifestly of the same scope and intent. Obviously, as to such a trust as was involved in the *Coolidge case*, the clause is invalid, but, it is submitted, it is not thereby to be considered as stricken from the statute.

Section 1403 of the Revenue Act of 1921 provides that the unconstitutionality of any provision of the Act as applied to any particular person or circumstances shall not invalidate the provisions as

applied to other persons and circumstances. *Hill* v. *Wallace*, 259 U. S. 44, 71; *National Life Insurance Company* v. *United States*, 48 Sup. Ct. 591.

When the features which impelled this Court to declare it unconstitutional in that case are removed, little objection to it can validly be made.

While the court below, applying the *Coolidge case*, held the Act unconstitutional, it apparently overlooked the fact that those features which impelled the *Coolidge* decision were not here present.

The basis of the decision that the statute is arbitrary, capricious, and burdensome as applied to a transaction entirely completed before its passage is that "* * * the conveyance by Mrs Coolidge to trustees was in no proper sense testamentary, and it bears no substantial relationship to the transfer by death. * * *" (p. 540). And further (p. 542):

> * * * the arbitrary, whimsical, and burdensome character of the challenged tax is plain enough. An excise is prescribed, but the amount of it is made to depend upon past lawful transactions, not testamentary in character and beyond recall. * * *

An examination of the two trusts here involved, in the light of that statement, will demonstrate that while "an excise is prescribed, the amount of it" is not "made to depend upon past lawful transactions," but upon transactions "testamentary in character" and, up to the time of settlor's death, not "beyond recall."

The general characteristics of a testamentary disposition, putting aside matters of form, are that the property go over at the death of the grantor and that during his lifetime the grantor have the power of using and disposing of the property. A revocable transfer is "ambulatory," and where, as here, the donor reserves the income during his lifetime the transaction is practically the exact equivalent of a disposition by will. *Farmers' Loan & Trust Co.* v. *Bowers*, 15 F. (2d) 706; *Matter of Schmidlapp*, 236 N. Y. 278.

Such a transaction is not completed at the time the trust is created and is not beyond recall. *Saltonstall* v. *Saltonstall*, 276 U. S. 260.

The value of the trust property is not included in the gross estate merely because the creation of the trust was intended to take effect in possession or enjoyment at or after death, but because in addition to its being so intended it is in fact and by virtue of the complete dominion over it retained by the grantor substantially his property. It may be applied by him during his lifetime to such purposes as he sees fit; it may be repossessed by him at any time he desires, and until his death he has the complete and exclusive enjoyment of it.

One of the objections made by this Court to applying the section to the trust in the *Coolidge case* was that the tax was measured by the value, as of the time of the settlor's death, of property transferred and over which the settlor's interest had ter-

minated prior to his death. This may clearly be distinguished from the instant case. In the *Coolidge case* the interest had ceased long before the settlor's death. In the instant case that interest subsisted up to the moment of his death and the value is measured as of the time of the death which terminated the interest.

We, therefore, submit that the arbitrary, capricious, and burdensome characteristics apparent in the *Coolidge Trust*, which alone established the fact that the Act exceeded the power of Congress to tax and amounted to a confiscation of property forbidden by the Fifth Amendment, are not present in the instant case.

The conclusion of this Court in the *Saltonstall case*, *supra*, fully sustains this contention. In that case the settlor, in the years 1905 to 1907, had created certain trusts, under which the income was to be paid to him during his life, or, at his option, to accumulate, and the right to revoke was retained by him, acting jointly with one of the trustees. Under a law of the State of Massachusetts (Mass. Acts, 1909, c. 527, Section 8) enacted subsequently to the founding of these trusts, a tax was laid on the transfer of property passing to anyone in the exercise of a power of appointment. Under this Act, as amended, a tax was laid upon the trust property, at the death of the settlor, in 1920. This was resisted and action brought, and the right to levy the tax affirmed by the Massachusetts Supreme Judicial Court. Upon writ of error from this Court consid-

eration was given only to the question whether the subsequent enactment was offensive to the Constitution, as depriving of property without due process.

This Court, in holding the Act valid and not unconstitutional, said (p. 271):

> So long as the privilege of succession has not been fully exercised it may be reached by the tax. [Citing authorities.] And in determining whether it has been so exercised technical distinctions between vested remainders and other interests are of little avail, for the shifting of the economic benefits and burdens of property, which is the subject of a succession tax, may even in the case of a vested remainder be restricted or suspended by other legal devices. A power of appointment reserved by the donor leaves the transfer, as to him, incomplete and subject to tax. * * *

In the case at bar the tax is laid on the transmission, which can not be completed until the cessation of the interest of the settlor. In the *Saltonstall case* the tax is laid on the privilege of succession, which this Court holds incomplete so long as not fully exercised. Neither the cessation of interest in the one case nor the exercised privilege of succession, in the other, can occur until the death of the settlor. As the tax applies on the privilege of succession made complete by the settlor's death, it would seem to follow that the tax could apply equally well on the

transmission under the instant trusts where the interest only ceases at the settlor's death.

Looking at the matter in another light, the property, as distinguished from an estate in the property, passed and was transmitted at death, and upon this transmission the tax is imposed. The tax so imposed was reckoned upon the value of the interest which passed, for while it is true that the reservation of a power to revoke does not create any technical estate in the property, it is nevertheless, equally true that the reservation of such a power gives the grantor complete dominion over the property. Such dominion justifies Congress in treating the decedent's interest as equivalent to a fee for the purposes of the taxing statute, for "to make a distinction between a general power and a limitation in fee, is to grasp at a shadow while the substance escapes." *See Bullen* v. *State of Wisconsin*, 240 U. S. 625, 630.

In addition to the reservation of the power which is tantamount to the ownership of the fee, the decedent here had the actual and exclusive enjoyment of the property during his lifetime. One warning was had by the passage of the Act that if interest and dominion over the property were retained it would be taxed. There was full opportunity to do as was done in the *Coolidge* case and relinquish that interest before death. This was not done, but, to the contrary, the property was retained within his dominion and the enjoyment of it until the settlor died. The Act thus did not impose "an unexpected

liability that if known might have induced those concerned to avoid it and to use their money in other ways" (*Lewellyn* v. *Frick*, 268 U. S. 238, 252), but the settlor, with regard to Trusts Nos. 1831 and 3048, had ample opportunity and power to make any disposition of the property which he wanted after the Act was passed, and it is submitted that, in imposing a death duty upon a transaction, which was in its nature testamentary and in which his interest was retained up to the time of his death, there is nothing arbitrary, whimsical or burdensome.

III

TRUSTS CREATED IN 1919, DURING THE EFFECTIVENESS OF SECTION 402 (C) OF THE REVENUE ACT OF 1918, WHICH IS IDENTICAL WITH THE ONE HERE INVOLVED, MAY BE INCLUDED IN THE GROSS INCOME OF A DECEDENT'S ESTATE UNDER SECTION 402 (C) OF THE REVENUE ACT OF 1921, AS THE REPEAL OF THE EARLIER SECTION AND ITS REENACTMENT IN THE REVENUE ACT OF 1921 DOES NOT CREATE A NEW LAW, ATTEMPTING TO REACH BACK, BUT IS A CONTINUATION OF THE OLD.

The preceding argument disposes of Trusts Nos. 1831 and 3048, which were created prior to the passage of any Federal estate tax law.

It remains to dispose of those trusts created after the passage of such a law, but, as to which the settlor did not die until after that law had been repealed and another identical law was in effect.

In 1919, while the Revenue Act of 1918 was in force, the settlor created Trusts Nos. 4477, 4478, 4479, 4480 and 4481.

The Revenue Act of 1918 contains a section identical with the one here involved. (See Section 402 (c), Revenue Act of 1918.) Prior to the death of the settlor the Revenue Act of 1918 was repealed and that of 1921 enacted. This latter Act contained Section 402 (c), here involved. If the trusts created in 1919 are within the intended scope of Section 402 (c), as heretofore discussed (see Point I, this brief), the only inquiry as to these five trusts is as to whether the repeal of the Revenue Act of 1918 and the reenactment of the pertinent section in the Revenue Act of 1921 created a new law which attempted to include "property transferred by a decedent prior to its passage," as declared unconstitutional by this Court in the *Coolidge case*.

The repealing clause of the Revenue Act of 1921 (Section 1400 (a)) does not contain any express reservation with respect to taxes which would have been imposed under the 1918 Act had it not been repealed. The Act discloses an intention on the part of Congress to hold as a part of a decedent's gross estate under the Revenue Act of 1921 the same transfers which would have been a part of his gross estate had the 1918 Act not been repealed, for it expressly includes transfers, "whether made before or after" the passage of the Act.

Although the statute involved in the *Coolidge case* was held to be unconstitutional in so far as it required that there should be included in the gross

estate the value of property transferred by a decedent prior to its passage, that decision was reached because the settlor's interest had completely terminated prior to his death and the only justification urged for the inclusion was the mere fact that possession or enjoyment was postponed. The decision, however, can not be extended to prevent the inclusion of property transferred by a prior trust in cases where an interest ceases by death and furnishes an occasion for the tax. In other words, the time of the creation of the trust is not important if, in fact, the trust is of testamentary character.

However, even if mere retroactivity were sufficient to prevent the inclusion of property previously transferred, we submit that, properly considered, retroactivity does not actually exist. The estate tax is a part of the scheme of taxation embraced in the Act of 1918 as well as in the Act of 1921. Both are in reality "Codes." It was repealed not because the tax was to be discontinued but because a new "Code" was issued. The effect of such a repeal and reenactment has been before the courts many times, and it is held that, where there is an express repeal of an existing statute and a reenactment of it at the same time, the reenactment neutralizes the repeal so far as the terms of the new Act are the same as those of the repealed Act. The old law continues without interruption.

In the case of *Bear Lake Irrigation Co.* v. *Garland*, 164 U. S. 1, which presented a similar question, this Court said (p. 11):

> Upon comparing the two acts of 1888 and 1890 together, it is seen that they both legislate upon the same subject, and in many cases the provisions of the two statutes are similar and almost identical. Although there is a formal repeal of the old by the new statute, still there never has been a moment of time since the passage of the act of 1888 when these similar provisions have not been in force. Notwithstanding, therefore, this formal repeal, it is, as we think, entirely correct to say that the new act should be construed as a continuation of the old with the modification contained in the new act. This is the same principle that is recognized and asserted in *Steamship Co.* v. *Joliffe*, 2 Wall. 450, 459. In that case there was a repeal in terms of the former statute, and yet it was held that it was not the intention of the legislature to thereby impair the right to fees which had arisen under the act which was repealed. As the provisions of the new act took effect simultaneously with the repeal of the old one, the court held that the new one might more properly be said to be substituted in the place of the old one, and to continue in force, with modifications, the provisions of the old act, instead of abrogating or annulling them and reenacting the same as a new and original act.

See also *Lewis' Sutherland Statutory Construction*, Vol. 1, 2d Ed., Sec. 238; *Lamb* v. *Powder River Live Stock Co.*, 132 Fed. 434; *Great Northern Ry. Co.* v. *United States*, 155 Fed. 945; *Steamship Co.* v. *Joliffe*, 2 Wall. 450.

In effect these trusts were created subsequently to the passage of the section. The settlor had full notice of the effect of Section 402 (c) of the Revenue Act of 1918 upon them when they were created. He can not be presumed to have made them with a knowledge that he would outlive the Act. Can the tax, then, be defeated merely because of the accident of the repeal of the Act, under which the tax would have applied, prior to his own death? The equity here is on the side of the Government.

IV

CONGRESS HAS POWER TO INCLUDE IN DECEDENT'S GROSS ESTATE THE VALUE OF PROPERTY WITH RESPECT TO WHICH A TRUST HAS BEEN CREATED DURING THE EFFECTIVENESS OF A PRIOR IDENTICAL SECTION WITH THAT HERE INVOLVED WHERE SOME PRESENT INTEREST AND A QUALIFIED RIGHT TO REVOKE IS RETAINED BY THE SETTLOR ALTHOUGH THE INCOME IS PAYABLE TO OTHERS THAN THE SETTLOR

Having shown that no valid objection can be made on the ground of retroactivity, it is now necessary to determine whether or not the five trusts of 1919 (Trusts Nos. 4477–4481, incl.) are testamentary in character and escape the condemnation of the *Coolidge case* on that score.

It is believed that these five trusts not only come within the purview of Section 402 (c) of the Revenue Act of 1921 but that the limitations which circumscribe them, and, particularly, the interest retained by the settlor throughout his life, serve to so differentiate them from those in the *Coolidge case* that that decision can have no effect here.

This Court in that case determined the section to be unconstitutional in that it attempted to tax a past lawful transaction which was not testamentary in effect. Such a state of facts is not here present. The transaction in this case is testamentary. Under it the settlor retains an interest up to the moment of his death, and the passage to the beneficiary of the corpus can not take place until the settlor's death.

This Court has described the Federal estate tax as being one imposed upon an "interest which ceased by reason of death." *U. M. C. A. v. Davis*, 264 U. S. 47, 50; *Edwards v. Slocum*, 264 U. S. 61. An instrument creating a trust may be so limited in its scope that its execution and delivery do not operate to terminate this interest. The transmission is not complete as to the founder until he has parted not only with the title but also with the use, enjoyment, and dominion.

The settlor by virtue of the five trusts retained to a large degree the management and control and had a substantial interest in the trust property until his death. The trustee was to be "governed by any

instructions or directions in writing given to it by said party of the first part in regard to the management, sale, or investment of any part of the said trust estate." (R. 4, 18, 26, 33, 41.) The trustee was required to execute proxies as requested by the founder, thus enabling the founder to vote the stock in his discretion. (R. 4, 19, 26, 34, 41.) The trustee was required to "observe and be governed by any instructions or requests in relation thereto (to real estate) made by an instrument in writing, signed by" the founder. (R. 5, 19, 27, 34, 42.) In case of the resignation or disability of any trustee the founder retained the power to appoint a successor. (R. 7, 21, 29, 36, 44.) He had a restricted power to alter, change, or modify the terms of the trust. (R. 7, 21, 29, 37, 44.) He thus retained, for his lifetime, complete dominion over the property as distinguished from the beneficiaries' interest in the income and corpus of the trust. This dominion ceased at his death, and it is submitted that this cessation was the cessation of an interest sufficient to support the tax. (See Sec. 402(e) under which the possession of a general power of appointment over property is considered sufficient interest. This section has been held valid in *Pennsylvania Company, etc.* v. *Lederer*, 292 Fed. 629, and *Whitlock-Rose* v. *McCaughn*, 21 F. (2d) 164.)

Such a power—to alter, change, or modify—is tantamount to a power of revocation. Just as

"the beneficiary's acquisition of the property is equally incomplete whether the power be reserved to the donor or another" (*Saltonstall* v. *Saltonstall, supra*), so the donor's interest has not ceased so long as he has a power of revocation, whether that power be reserved to himself alone or in conjunction with others.

In Trust No. 4477 the power to revoke or amend was retained by the settlor, acting in conjunction with a majority of the five named beneficiaries, or a majority of the survivors of them. Necessarily, if they predeceased him the power became his alone. As to Trusts Nos. 4478, 4479, 4480, and 4481, the power was retained to revoke or amend, with the concurrence of the single beneficiary in each of them named. The death, in any case, of any one of these beneficiaries gave to the settlor the absolute right. This is true, because even upon the death of all the named beneficiaries the trusts still remain operative, but the successors do not share the right to alter, change, or modify.

These trusts, which control the course of property after the owner's death, have a pronounced effect on the public revenues; for, in such cases, it is not only the present transfer of property from one to another which is relieved from tax, but many future transfers. Although the case at bar is not a striking instance since there is but one transmission after decedent's death controlled by the terms of the trust, it is easy to see how under similar trusts

the course of property might be controlled for many years so that not only the tax on the transfer from this decedent to the objects of his bounty would be defeated, but, also, future transmissions for several generations might be tax free. Thus it could easily happen that large estates, and these estates are those which produce the revenue, might pass from father to son, to grandson, and perhaps still further, free and clear from any estate tax, although the object of all death duties is to tax such transmissions.

The attention of the Court is called to the fact that the corpus of a similar trust was held not to be a part of a decedent's estate under Section 402 (c) of the Revenue Act of 1918 by the Circuit Court of Appeals for the Second Circuit in the recent case of *Farmers' Loan and Trust Company, Trustee*, v. *Frank K. Bowers, Collector*, unreported (copy in Appendix B). It should be noted that the trust in this case was created prior to the passage of the first Federal estate tax law in 1916, but that this phase of the question was not considered at all by the court. This opinion of the Circuit Court of Appeals for the Second Circuit only affects the question involved in this case with respect to the trusts of 1919 (Trusts Nos. 4477, 4478, 4479, 4480, 4481). The Government submits, however, that that decision is erroneous for the same reasons that have been urged in this brief against the decision of the court below in the instant case.

CONCLUSION

It is respectfully submitted that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit was erroneous and should be reversed.

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APPENDIX A

The first regulations published under the estate tax Act as Treasury Decision 2378 provides in Art. IV, subdivision (2):

> All property transferred by decedent during his lifetime, but in contemplation of, or intended to take effect, at his death. This includes not only property transferred by an instrument effecting a final disposition at the transferor's death, but transfers of any kind, including gifts and sales that were not bona fide—i. e., made for an adequate consideration in money or money's worth—where it can be established that such transfers were made in contemplation of death. The law provides not only that all such transfers of any portion of decedent's property shall be included in the gross estate, but that all such transfers of material value made within two years prior to death shall be presumed to have been made in contemplation of death, and the burden of proving that they were not made in such contemplation and securing their exemption from tax is placed upon the beneficiary. Wherever, therefore, a collector or agent shall have knowledge of such a gift, "sale," or other transfer he shall require that it be returned as a part of the decedent's gross estate. All executors and administrators having knowledge of such transfers as are described in this paragraph are required by the law to set forth the facts upon their return of the estate (Form —).

The next edition of these regulations issued in pamphlet form on October 10, 1916, and not published as a Treasury Decision, carries the same

language. In the May, 1917, edition also issued in pamphlet form and not published as a Treasury Decision no reference to such transfers is made.

The 1918 Edition of Regulations 37 (also called the 1919 Edition), published as Treasury Decision 2910, provides in Art. 24:

> *Reservation of income.*—A transfer is taxable where the grantor reserves to himself during life the income of the property transferred. In such a case the transfer of the principal takes effect in possession and enjoyment after the death of the grantor, and the value of the entire property should be included in the gross estate. Where the grantor reserves a proportionate part of the income, only a corresponding proportion of the property should be included in the gross estate, unless the transfer was made in contemplation of death. If, for example, he reserves one-half of the income, the value of one-half of the property transferred should be included in the gross estate. If he reserves an annuity, so much of the property as is necessary to produce the annuity should be included in the gross estate. Where the property does not produce income, its value as of the date of the decedent's death should be ascertained, and so much of this sum as is necessary to produce the annuity should be included in the gross estate. A transfer is taxable in accordance with these principles whether the grantor makes a reservation of the annuity out of the property conveyed, or exacts from the grantee an agreement to pay the annuity. A gift of the principal of a trust fund which takes effect at or after the decedent's death is taxable, although the income during the decedent's life is payable to some one other than himself. Example:

> The decedent transfers property to his son, the latter agreeing to pay the income to his mother during the decedent's life. The transfer to the son is taxable.

The same provision is found in Article 24 of the 1921 Edition of Regulations 37 published as Treasury Decision 3145. Prior to these regulations Treasury Decision 20444 had been issued, but the facts stated are so meagre as to make it of little value for the purposes in hand.

In Regulations 63, 1922 Edition, relating to the 1921 Act, published as Treasury Decision 3384, Article 17 provides that—

> * * * The value of property, where title was so transferred by the decedent before September 9, 1916, is to be included in his gross estate if his death occurred after the effective date of the Revenue Act of 1918, but is not to be included if he died prior thereto.

and Article 19 provides under the caption "Transfers Intended to Take Effect at or After Death" as follows:

> *General.*—All transfers at any time made by the decedent, other than bona fide sales for a fair consideration in money or money's worth, which were intended to take effect in possession or enjoyment at or after his death, are taxable, and the value of the property so transferred, as of the date of the decedent's death, must be returned as a part of the gross estate.

Articles 17 and 19 of Regulations 63 were, after the decision of this Court in the *Coolidge case*, amended in accordance with the Bureau's interpretation of the *Coolidge* decision, so that thereafter—

All transfers made by the decedent subsequent to September 8, 1916, other than bona fide sales for a fair consideration in money or money's worth, which were intended to take effect in possession or enjoyment at or after his death, are taxable, and the value, as of the date of the decedent's death, of property or interest so transferred must be returned as part of the gross estate.

Where a transfer (whether made before or after the passage of the revenue act of 1916) was intended to take effect in possession or enjoyment at or after the decedent's death, and the enjoyment of the property or the interest transferred was subject at the date of the decedent's death to change by the exercise of any power to alter, amend, or revoke, the value, as of the date of the decedent's death, of the property or interest so transferred must be returned as a part of the gross estate.—Art. 19, Regulations 63, as amended August 12, 1927, T. D. 4064.

This is the rule in effect at the present time.

APPENDIX B

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Farmers' Loan and Trust Company (a corporation) as Trustee under a Deed of Trust made by William Waldorf Astor (now deceased) dated May 25th, 1916, plaintiff-appellant, against Frank K. Bowers, Collector of Internal Revenue for the Second District of New York, defendant-appellee

Before: Manton, Swan, and A. N. Hand, Circuit Judges.

MANTON, *Circuit Judge:*

On May 25, 1916, three years before his death, William Waldorf Astor, a British subject, made a deed of trust in a very large amount. Plaintiff in error was named as trustee, and there was transferred to it stocks, bonds and cash to be held by it upon the trusts thereby imposed. On December 26, 1916, and again on August 15, 1919, modifications of the deed of trust were made, to which we shall refer. The plaintiff in error, as executor of the Astor Estate, by virtue of an American will dated September 16, 1919, filed an estate-tax return showing a gross estate of the decedent subject to tax imposed by the 1918 Act. This will disposed of holdings in the United States other than the funds referred to in the deed of trust. The tax thereon was paid. In the return reference was made and information given as to the property conveyed by

this deed of trust. The Commissioner on July 11, 1922, ruled that the *corpus* of this trust fund constituted a part of the decedent's estate subject to tax under § 402 of the Act of February 24, 1919 (40 Stat. 1097), which provides:

> That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated— * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this act), except in case of a bona fide sale for a fair consideration in money or money's worth. * * *
>
> (e) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of bona fide sale for a fair consideration in money or money's worth.

The tax resulting from this assessment was paid under duress, and this action seeks to recover it.

The court below granted judgment for that part of the tax arising from the inclusion as part of the estate subject to estate tax, of Liberty Bonds in the principal amount of $1,331,540.40—this because these bonds were exempt from an estate tax by reason of the provisions of the Victory Liberty Loan Act, and denied further relief.

The deed of trust, as made on May 25, 1916, provided that the funds be invested and reinvested by the trustee and the income be distributed to one or more of the issue of the settlor and the wife or husband of such issue, and such charities as the settlor should by instrument in writing instruct and direct, and in default of such direction, to be paid to such charities as the trustee in its absolute discretion might think proper. No income was reserved to the settlor. It provided that at the death of the settlor the principal then in the hands of the trustee should be distributed to and among the issue of the settlor in such shares or manner provided by the laws of New York as the settlor might by will or codicil specifically referring to such power, appoint, and in default of such appointment, to and among his issue then surviving in equal shares *per stirpes* and not *per capita*. As to such of the issue, however, who were in being at the date of the settlement but who were minors at the time of the settlor's death, it continued to be held in trust during their respective minorities. It further provided that the settlor, but only with the written consent of the trustee, might modify or revoke the indenture and trust thereby created, either in whole or in part. The plaintiff in error was named and has since acted as trustee.

On December 28, 1916, the settlor delivered to the trustee an instrument which modified this deed of trust so as to provide for the payment out of the trust fund of all taxes, if any were payable, on or by reason of the death of the settlor "upon or in respect of said trust fund" and such English death duties as may be imposed upon his estate. Again, on August 15, 1919, the settlor executed and

delivered an instrument by which he, with the consent in writing of the trustee, as required by the indenture of May 25, 1916, modified the trust to the extent only of rearranging the shares in the corpus going to the settlor's issue. It provided that upon the death of the settler without exercising the power of appointment reserved to him in the indenture, the trustee should divide the capital of the trust fund then in its hands, into two portions of equal value, provided the settlor during his lifetime should have paid to the trustee of a certain English indenture of covenant and settlement made on the marriage of his son John Jacob with Violet Mary Mercer Nairne, the sum of four million dollars agreed to be paid by the settlor to John Jacob Astor, and if all such sums had not been paid, that then one portion of the corpus should be less than the net value of the other portion by so much of the principal of four million dollars as should not have been so paid by the settlor during his life, and should distribute that portion of the capital of the corpus to all or any of the sons of the settlor's eldest son, Waldorf Astor, living at the time of the death of the settlor, and, if more than one, in equal shares; in default of any such son living at that time, then to the persons constituting the issue of the settlor as referred to in the instrument.

The other of the two portions of the corpus was to be distributed to John Jacob Astor unless he should predecease the settlor and in that event, to certain issue of the settlor as provided. The shares of the persons who were infants at the date of the indenture of 1916 and who were under the age of 21 years at the time of the settlor's death, were to be held in trust during minority. At the time of

his death, the settlor left two sons and four grandsons, the latter sons of Waldorf Astor. One grandson was born after May 25, 1916. When the settlor died, he left an American, an English and an Italian will and in neither did he exercise the limited power of appointment reserved to him by the deed of trust.

The question of this appeal is whether the corpus of this trust fund was properly held to be within Sec. 402 of the Taxing Act as a part of the decedent's net estate subject to the estate tax. Had there been no modification on August 15, 1919, after the passage of the taxing act, the cases of *Nichols* v. *Coolidge*, 274 U. S. 531 and Frew V. Bowers, 12 Fed. (2d) 625 would dispose of the question against the government's claims. But the argument is that the trustee was directed to apply the income during the life of the settlor to and among his next of kin "as the grantor by written appointment shall direct" and while no time was fixed therefor, if there was a default of such appointment, the trustee during the life of the settlor was to apply the income to such charities and in such amounts as the trustee in its absolute discretion deemed proper and after his death distribution of the trust fund was to be made to the issue of the settlor then surviving, in equal shares *per stirpes* and not *per capita*.

Further, that the settlor reserved to himself the right at any time to revoke the trust in whole or in part; also to appoint "such new and other trusts powers or provisions as said Grantor may think fit in favor of or for the benefit of the Grantor himself or any one or more of the issue of the said grantor and any husband or wife of any such is-

sue." Acknowledging that written consent of the trustee was necessary, the argument proceeds that the power of removal of the trustee might be exercised and thus full and complete authority rested with the settlor to make the change without the trustee; that in any case the consent of the trustee was a mere formality which in nowise acted as a limitation on the general power of revocation. It is said that the corpus of the trust fund passed on the donor's death to certain beneficiaries by reason of the supplemental indenture of August 15, 1919. *Nichols* v. *Coolidge*, *supra*, is distinguished on the theory that here there is a reserved power to modify.

By the indenture of May, 1916, the settlor parted with all control over the corpus of the trust except a conditional power to revoke and then only with the consent of the trustee. The trustee had obligations with respect to the trust property and the rights of the beneficiaries. Its consent could be granted only with due regard for such duties. Thus the settlor was beyond the power legally to control. In the *Nichols* v. *Coolidge case*, the grantee gave back a terminable lease with provisions for annual renewal and by it the grantor could occupy the premises as long as she chose. But the court held that Mrs. Coolidge's rights must be governed by the terms of the lease. In *Saltonstall* v. *Same*, 276 U. S. 260, where the court considered a Massachusetts succession tax as distinguished from a transfer tax, it said: "A power of appointment reserved by the donor leaves the transfer, as to him, incomplete and subject to a tax." *Bullen* v. *Wisconsin*, 240 U. S. 625.

But nothing in the *Saltonstall case* indicates that the transfer would be incomplete as to the settlor, who reserves a power of revocation conditional on a consent, and beyond his legal power to control. Here no suggestion is made that there was an interest to evade the tax by depriving the settlor of legal power to control and placing it within the power of a friendly trustee to grant or refuse. A power to revoke is not a property right nor an interest in property. *Jones* v. *Clifton*, 101 U. S. 225; *Hill* v. *Nichols*, 18 Fed. (2d) 139; *Reinecke* v. *Northern Trust Co.*, 24 Fed. (2) 91; *In re Dolan's Estate*, 279 Pa. St. 582; *Stone* v. *Hackett*, 12 Gray (Mass.) 227. The power of revocation is perfectly consistent with the creation of a valid trust. Title passes to the donee and remains vested for the purpose of the trust even though there be a right to revoke it.

The power to revoke is not evidence of an intent to postpone the legal enjoyment, existence, or effect of that which may perhaps thereafter be brought to an end for the reason that the enjoyment and possession actually passes to the beneficiaries. Until the right to revoke is exercised an estate exists by virtue of the transfer. *People* v. *Northern Trust Co.*, 289 Ill. 475; *In re Dolan's Estate*, *supra*. Such a power is not transferable or descendable nor may it be alienated or passed by a will. It is personal to the holder. *Lewellyn* v. *Frick*, 268 U. S. 238; *Jones* v. *Clifton*, *supra*; *Reinecke* v. *Northern Trust Co.*, *supra*. When in May, 1916, the settlor made his indenture he transferred his title and also all possession and enjoyment. His reserved powers were not conditions of the vesting

of the estate, but merely conditional limitations. Such has been the rule under the transfer tax in New York State referring to a transfer intending to take effect in possession and enjoyment at or after death. *Matter of Miller*, 236 N. Y. 290; *Matter of Carnegie*, 203 App. Div. 91, affd. 236 N. Y. 517. But where, in adition to the power to revoke, there is reserved to the grantor the income during life and the power to pass upon and dictate as to investments and reinvestments, the transfer tax is payable. *Matter of Schmidlapp*, 236 N. Y. 278. Moreover, the consent of the trustee to revoke must be honest and in accord with the legal rights of the *cestui que trustent*. It is always subject to review by a court of equity.

The May, 1916, indenture provided that the remainder, in the absence of the exercise of the limited power of the settler to appoint by will, was to go to his issue *per stirpes* and not *per capita*. The August, 1919, modification provided that the principal at the time of his death should remain in trust for such grandchildren as were under age until their majority to the extent of their interest therein, and should then be distributed among them. The modifications made by this instrument did not change the fact that the trust had been created on May 25, 1916, and that the transfer had occurred then, and nothing that he could do thereafter would alter or change that transaction or that trust unless he revoked in *toto* the trust instrument and subsequently created a new and different trust. The modification gave to some of the original remaindermen larger proportions than that vested in them on May 25, 1916, and took away from others of the original remaindermen portions

vested in them at that time. However, all such changes in the rights of remaindermen were made within the group originally fixed and no persons outside that group profited thereby. John Jacob Astor, an original remainderman, continued throughout until the death of the settlor, to be vested with one-third of the *corpus* of the trust fund. His interest was never reduced. If the settlor had completely revoked the trust, repossessed himself of the property and made a new settlement, he would have made a transfer or created a trust within the meaning of § 402 (c), but by the 1919 modification he changed the interest of his issue; he did not transfer his property. Section 402 (c) refers to the extent of "any interest," and this refers to an interest of the decedent. *United States* v. *Fields*, 255 U. S.

Congress made plain by Section 402(e) that the exercise of such a power of appointment was not within Section 402(c) for by express provision it refers to a general power of appointment when made by a deed executed in contemplation or intended to take effect in possession or enjoyment at or after death. The power to appoint the remainderman by will to and among the issue of the settlor is a limited power of appointment and in view of the principle of *United States* v. *Field*, *supra*, is not taxable. It is not an interest in property. Congress imposed a tax specifically by the act of 1918 (Section 402-e) on the exercise of general powers of appointment. But he did not exercise it and the property did not pass by the exercise of any power of appointment under any of his wills. It will be noted that it was by deed

and not by will that, on August 15, 1919, the settlor, within the direct limitations of the trust instrument of May 25, 1916, exercised in favor of his issue, with the trustee's consent, this limited power. This was but the culmination of the original plan decided upon in May, 1916, to settle his property on his children and grandchildren. His purpose was to give outright the property to the sons of his eldest son and his younger son. An absolute and unconditional power to revoke a trust is treated as equivalent to a general power to appoint. *Bullen v. Wisconsin*, 240 U. S. 625. But here there is no such absolute and unconditional power. The trustee's consent was necessary for the settlor's exercise of the power.

It therefore required the action of both. The power could not be exercised by the settlor alone and therefore it was not a general power exercised by the decedent within the meaning of the statute. Congress intended only to tax the general power which the settlor might have exercised himself or treated the property as a part of his estate. It is apparent Congress made such a distinction between a general power exercised by a decedent and a limited power requiring more than the act or will of the settlor. In the instant case, if the settlor had appointed himself as beneficiary it might well be that the trustee could have lawfully refused consent to such a proposal in the interest of the beneficiaries. Therefore, we hold that a "general power of appointment exercised by the decedent" refers to a power exercised solely by him, and that §402(e) of the act does not justify a tax on the power of appointment reserved to this settlor. A general power of appointment contemplates a power of no

restrictions as to who may be appointees and the exercise of that general power referred to in the statute which is subject to the tax, is the normal power of appointment or one actually expressed and not something merely analogous to a power of appointment. The statute seems clear enough and this transaction must come within its terms before the tax can be exacted. *Gould* v. *Gould*, 245 U. S. 151.

These views make it unnecessary for us to consider the question of the unconstitutionality of the taxing act as argued or the other claims for the exemptions from taxation of parts of the *corpus* of the trust.

This tax was erroneously exacted and the plaintiff in error is entitled to a judgment for the amount it paid.

Judgment reversed.

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1927.

No. [redacted] 90

MABEL G. REINECKE, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF ILLINOIS,

Petitioner,

vs.

THE NORTHERN TRUST COMPANY, AS EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF A. C. BARTLETT, DECEASED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION

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[redacted] PRINTING COMPANY, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 836.

MABEL G. REINECKE, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF ILLINOIS,

Petitioner,

vs.

THE NORTHERN TRUST COMPANY, AS EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF A. C. BARTLETT, DECEASED.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

STATEMENT.

In assessing the estate tax involved in this matter the value of certain trust properties was included in the gross estate on the theory that the trusts in question were "created to take effect in possession or enjoyment at or after the death of the decedent."

There was no claim at any time that the trusts or any of them were made in contemplation of death.

There were seven such trusts, and seven counts in the declaration—one for each of the trusts.

The demurrer of the petitioner, the defendant below, was overruled. The defendant stood by her demurrer, and judgment was therefore given for the taxpayer, plaintiff below.

The Circuit Court of Appeals of the Seventh Circuit, on appeal affirmed the action of the lower court. Its written opinion, though not as yet published, is to be found at page 94 of the record before this court.

The synopsis of these trusts, as given by the counsel for the petitioner is, in the main, correct. We wish only to point out, for the purposes of appropriate emphasis, the following basic facts:

The outstanding fact to be noted is that by no one of the five trusts made in 1919 does the grantor retain any interest whatsoever in the income produced by the trust properties. The income goes entirely to the beneficiaries named. In the first trust, the one for Mrs. Bartlett, twenty-four thousand dollars ($24,000) a year was to be paid to her and the balance was to be accumulated until after the death of the grantor. (Trust Art. 3, Par. 1 and 2; Rec., 9.) The income from the other four trusts for the son and daughters of the grantor was in the first place accumulated. (Trust Art. 3; Rec., 29, 38, 48, 58.) But by amendments to the trusts the income thereafter was payable to the beneficiaries as they desired. (Rec., 32, 42, 52, 61.)

In none of these five trusts does the grantor retain any power of revocation. All of them have the same powers with reference to changes and modifications. That is

to say, in the case of Mrs. Bartlett's trust a majority of the children of Mr. Bartlett can make changes provided he consents. (Trust Art. 6, Par. 2; Rec., 12.)

And in the case of the other four trusts changes and modifications may be made by the joint consent of the particular beneficiary and the grantor, but it is to be noted particularly that there is no power of change reserved in the grantor *himself*. The change can only be made by the *combined act* of the grantor and beneficiary. In other words it was a mere veto power.

In short, these powers are to be read in connection with the prime purpose of the grantor in making the trusts (Art. 6, Par. 1; Rec., 12), namely that he did so

> "* * * for the support and maintenance of the beneficiaries."

With that end in mind it is clear that all of these provisions, to use the language of the Circuit Court of Appeals, are

> "* * * reasonable and prudent provisions which in no way affect or defeat the real purposes of the trusts. The settlor, by these reservations took nothing for himself, but each reservation is a pledge on his part of advice and assistance to the trustee for the benefit of the beneficiaries." (Rec., 96.)

As to the trusts created in 1903 and 1909, referred to in the sixth and seventh counts of the declaration, they were completed acts in those years, long before any federal estate tax statute was on the books.

THE POSITION OF THE RESPONDENT.

The position of the respondent is:

I.

AS TO THE FIVE TRUSTS OF 1919.

(A) That they were not within the statutory language "to take effect in possession or enjoyment at or after death," and that the cases of *Coolidge* v. *Nichols*, 274 U. S. 531, and *Shukert* v. *Allen*, 273 U. S. 545, construing this very language are decisive of this proposition.

(B) As an additional reason for the conclusion that these trusts were not taxable the respondent submits: that the tax imposed in this case was imposed under the Revenue Law of 1921; that the trusts of 1919 were made before that law was passed; that the provision in the 1921 Act attempting to make that act retroactive as to prior trusts is held unconstitutional in the *Coolidge Case*, *supra*, that there was neither a saving clause with reference to the prior act—the Act of 1919 which was in force when the 1919 trusts were made—nor did the decision of this court in the *Coolidge Case*, that the retroactive provision of the 1921 act was unconstitutional, revive the necessary portion of the 1919 act.

II.

AS TO THE TWO TRUSTS OF 1903 AND 1910.

These trusts were completed acts long before the 1921 or any other act went into effect, and the fact that they contained powers of revocation is no basis for a sound distinction between them and the holding in the *Coolidge Case*.

BRIEF AND ARGUMENT.

I.

A. THE FIVE TRUSTS OF 1919.

Under the cases of *Coolidge* v. *Nichols*, 274 U. S. 531, and *Shukert* v. *Allen*, 273 U. S. 545, the trusts of 1919 are not within the language of the statute, "take effect in the possession or enjoyment at or after death."

The argument of petitioner with reference to the trusts for 1919 (page 11) is that because the enjoyment of the remaindermen in the trust property is expressly deferred until after the death of the settlor, the trusts are within the language in question.

But that same contention was made by the Internal Revenue Department in the *Shukert Case* above cited, and the holding of this court in that case decided that contention against the petitioner.

In that case the life expectancy of the settlor when he made the trust was only sixteen years, and under the trust neither the income nor the principal came into the possession or enjoyment of the remaindermen or any of the beneficiaries for thirty years. It was contended by the Internal Revenue Department that therefore the trust did not take effect in possession or enjoyment until after the death of the settlor. This court in that case held directly to the contrary.

In the *Coolidge Case* the same contention was advanced on the ground that the Internal Revenue statute, particularly the phrase quoted, was meant to reach and tax testamentary acts, and that the Coolidge trust was

testamentary because the remaindermen received nothing until after the death of the settlor.

The trust in that case provided, in the first instance, that the income was to go to the two settlors. By an amendment made sometime before the death of the survivor of the settlors the income went to the beneficiaries immediately. But at no time was the principal to be received by the remaindermen until the death of the survivor of the settlors.

It was because of this situation that the Internal Revenue Department contended that the trust was testamentary, and therefore taxable. But this court held (*Coolidge Case*, p. 540), that the conveyance in question was in no proper sense testamentary, and bore no substantial relationship to the transfer by death.

The case of *Saltonstall* v. *Saltonstall* (No. 144, U. S.), 48 Sup. Ct. Rep. 225, decided February 20, 1928, is not in point on this inquiry. The Massachusetts statute there involved, as particularly pointed out by this court, was a statute imposing a tax on the privilege enjoyed by the beneficiary of the succession to and enjoyment of property, and was not a tax upon the privilege of the testator of transmitting property. On the other hand, in the *Coolidge Case*, this court held that the statute involved in that case, which is practically the same statute as that involved in the case at bar, was not a succession tax but an excise tax on the privilege of transmitting property at death. (p. 541.)

As was stated in the *Coolidge Case*, and many times before, by this court the tax imposed by this statute is an excise tax on the transfer of his net estate by a decedent. It does not tax the interest to which some person succeeds on death, but the interests which cease by reason of death. (*Coolidge* v. *Nichols*, 274 U. S. 537,

541.) And if there is no property to transmit there would be nothing upon which the tax levied on the occasion of death could be computed. *Knowlton* v. *Moore*, 178 U. S. 78.

The decedent in the case at bar at the time of his death had no title or interest in the trust property which he could transmit. In his lifetime he had parted with every vestige of title and interest in the property. He had at death no right or privilege of transmitting the trust property upon which the statute could operate. The trust property was no part of his estate at the time of his death. There was no interest that ceased in him by reason of his death.

Under the terms of the trust agreement the trust came to an end at a certain time after the death of the decedent, but at that time the property did not pass *from the decedent*.

The fact that the trust terminated possibly five years after the death of the grantor, at which time the principal of the trust property changed hands from the trustee to the beneficiaries, does not in the least affect the general principle above set forth, or change the fundamental concept of these trusts. A property or interest may change hands at or after the death of the decedent, but so long as it does not change *from his* hands the transfer is not a testamentary transfer or a transfer of his estate. It is the transfer of an estate *of, from* and *to someone else*. The fixing of the time for the termination of the trust period was simply for the purpose of defining the class of ultimate beneficiaries.

Fidelity Trust Co., Adm. Dolan v. *McCaughn*, 17 Fed. (2nd) 605.

The only answer made by the Internal Revenue Department in the *Coolidge* and *Shukert Cases* to this construction of the act was as follows:

It not only admitted the construction contended for above but based its own argument upon that construction (*Coolidge* v. *Nichols*, 274 U. S. 539), and alleged (Department's Brief in Coolidge Case, October Term, 1926. No. 88, pp. 25, 26) that the tax is an excise imposed not upon the transfer of the statutory gross estate, *but upon the transfer of the decedent's interest in such property as he actually owned at the time of his death.* (Italics ours.) Then, to the obvious proposition that the trust property could not be taxable as it was no part of the decedent's estate at the time of his death, the answer is made that the section in question (Sec. 402) merely provides the *measure of the tax*.

That position was the fundamental position of the Internal Revenue Department urged upon this court in the Shukert and Coolidge Cases. It must meet and answer the same proposition in this case.

The major premise, that the tax is an excise imposed upon the transfer of the decedent's interest in such property as he actually owned at the time of his death, is the correct interpretation of the law, and is as true now as it was at the time that the position was taken by the Department in the Coolidge and Shukert Cases, and is equally applicable to this case, as the decedent had no interest whatsoever in the trust property at the time of his death.

In the brief in support of this petition no answer to this proposition is suggested, and it is submitted that the only possible answer is the one given in the brief of the Department of Internal Revenue in the Shukert and

Coolidge cases, namely, that the tax could be measured by the value of the trust property.

But this court in the *Coolidge Case*, 274 U. S. 539, clearly and definitely repudiates this theory, and comments upon the absurdity to which such a theory would lead. (542)

We urge, therefore, that under the holdings of the *Coolidge* and *Shukert Cases*, in order to tax any transfer by way of trust or otherwise, it must be shown that the property transferred was a part of the decedent's estate at death, and was transferred from him at that time, and that therefore these two cases are decisive of the question involved in the case at bar, as far as the trusts of 1919 are concerned.

B. THE TAX IN THIS CASE IS IMPOSED UNDER THE REVENUE LAW OF 1921.

BUT THE TRUSTS OF 1919 WERE MADE BEFORE THE LAW OF 1921 BECAME EFFECTIVE.

THEREFORE, UNDER THE AUTHORITY OF THE COOLIDGE CASE, DECLARING THE RETROACTIVE PROVISION OF THE STATUTE UNCONSTITUTIONAL, THE BARTLETT TRUSTS OF 1919 ARE NOT TAXABLE.

The Internal Revenue Act of 1921, under which this tax is sought to be collected, repealed the 1918 act which was in force when the Bartlett trusts of 1919 were made.

The 1918 act had in it a provision identical with the provision under discussion, found in the 1921 act. But the 1921 act, in Section 1400 thereof, specifically repealed the 1918 act. There was no saving clause except as to the assessment and collection of taxes which had accrued

under the Revenue Act of 1918. Nothing had accrued, as far as these trusts were concerned, at the time the 1918 statute was repealed by the 1921 statute. Therefore there was no tax preserved by that saving clause.

The 1921 statute, Section 402 thereof, provided in subparagraph *c* for the taxing, in effect, of transfers "intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act)". This clause, when taken in conjunction with the repealing clause, Section 1400 above referred to, demonstrates beyond any question that Congress intended to tax trusts made *prior to* 1921 *under the* 1921 act, and not under any prior act, or not by any saving clause as to any prior act.

And this court held in the *Coolidge Case* (p. 539) that that intention of Congress was clear beyond any dispute.

But that intention was nullified when this court in the *Coolidge Case* (p. 539) declared that provision unconstitutional.

And that intention, having been nullified the prior statute or 1918 act was not thereby revived. Nor can another intention be read into the minds of Congress or into the act itself to tax such prior trusts under the statutes that were in force at the time those trusts were made.

The question raised by counsel for the petitioner (p. 12 of the petition for a writ of certiorari, question (3)), does not meet this proposition. The question is not whether Congress *had the power* to tax a trust intended to take effect in possession or enjoyment at or after the death of the decedent, and made while the prior statute was in force. But the question is whether Congress did

keep the former statute alive and preserve the tax imposed by the former act. It is clear that it did not, and such was not its intention.

See:

People v. *Carpenter*, 274 Ill. 103.

The Board of Tax Appeals in two well-considered decisions has held, since the rendition of the Coolidge decision by this court, that the trusts made prior to the passage of the act in force at the time of the death of the decedent were not taxable, even though within the language of the statute and even though they were made while a prior act was in force containing the same language.

Duggan Estate, 8 B. T. A. 482, 1927 Commerce Clearing House 3910.

Alsop Executor v. *Commissioner*, 7 B. T. A. 848, 1927 Commerce Clearing House 3376.

II.

THE FACT THAT POWERS OF REVOCATION ARE CONTAINED IN THE TRUSTS OF 1903 AND 1910 DOES NOT FURNISH A VALID BASIS FOR ANY DISTINCTION BETWEEN THESE TRUSTS INVOLVED IN THE COOLIDGE CASE.

Whether a deed of trust has in it a power of revocation or not, it is a completed transaction as of the time when it was made.

A deed of trust even containing such a power passes the title and possession of the property out of the settlor.

The right to revoke is not a property right in the settlor, and therefore there was nothing that passed

from him at his death by reason of such power of revocation.

Jones v. *Clifton*, 101 U. S. 225.

It has also been repeatedly held that the mere presence of a power of revocation in a trust indenture does not bring the trust within the language "to take effect in possession or enjoyment at or after death."

Cochran's Estate, 190 N. Y. Supp. 895.

In re Carnegie's Estate, 196 N. Y. Supp. 502 (Affd. 142 N. E. 266).

Masury Case, 51 N. Y. Supp. 331 (Affd. by N. Y. 1127).

Miller Estate, 236 N. Y. 290; 140 N. E. 701; 198 N. Y. Supp. 202.

In re Dolan's Estate (Pa.), 124 Atl. 176.

Newhall v. *Casey*, 18 Fed. (2nd) 447, 1927 C. C. H. 7552.

Commonwealth v. *McCauley's Executor* (Ky.), 179 S. W. 411.

Stark, Executor of Schmidlap v. *U. S.* ——— Fed (2d) ———.

1927 Commerce Clearing House, 7712. (Former opinion 14 Fed. (2nd) 616.

Hill v. *Nichols*, 18 Fed. (224) 139.

It is respectfully submitted that every case that comes before the Department of Internal Revenue need not, in order to be disposed of, have its exact counterpart in this court. Similarity in general principles ought to be sufficient as a guide to a decision. The two cases above referred to, particularly in view of the others preceding them, have amply construed the statute in question, and have determined the general principles governing this case, without the necessity of any review by

this court. Certainly it would seem from the decisions above cited which have been decided since the Coolidge and Shukert Cases were decided that neither the District Court, nor the Circuit Courts of Appeal, nor the Board of Tax Appeals, have had any difficulty in construing that statute in the light of those cases.

Therefore, we submit that the petition should be denied.

J. F. Dammann, Jr.,
Stuart T. Templeton.

Wilson, McIlvaine, Hale & Templeton,
Of Counsel.

FILED
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CHARLES ELMORE C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 90.

MABEL G. REINECKE, Collector of Internal Revenue for the First District of Illinois,

Petitioner,

vs.

THE NORTHERN TRUST COMPANY, as Executor under the Last Will and Testament of A. C. Bartlett, Deceased.

MOTION OF ELIHU ROOT, JR., FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*, AND BRIEF OF *AMICUS CURIAE*.

ELIHU ROOT, JR.,
Counsel for Home Trust Company, as Amicus Curiae.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

MABEL G. REINECKE, Collector of Internal Revenue for the First District of Illinois, Petitioner, *vs.* THE NORTHERN TRUST COMPANY, as Executor under the Last Will and Testament of A. C. BARTLETT, Deceased.	No. 90.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*.

MAY IT PLEASE THE COURT:

The undersigned, as counsel for Home Trust Company, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *amicus curiae*.

ELIHU ROOT, JR.,
Counsel for Home Trust Company
as *Amicus Curiae*.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

MABEL G. REINECKE, Collector of Internal Revenue for the First District of Illinois, Petitioner, *vs.* THE NORTHERN TRUST COMPANY, as Executor under the Last Will and Testament of A. C. BARTLETT, Deceased.	No. 90.

BRIEF OF ELIHU ROOT, JR., AS *AMICUS CURIAE.*

Statement.

Although this case involves Federal estate taxes collected in respect of seven trust agreements, this brief is concerned only with the trust created February 11, 1903 (R. 47), and is confined to a discussion of the constitutionality of the retroactive clause of Section 402 (c) of the Revenue Act of 1921 as applied to that trust (hereinafter referred to as the 1903 trust). The principles discussed in this brief also apply to the trust created December 30, 1910 (R. 49), but for the sake of simplicity only the 1903 trust will be discussed.

The decision herein as to the 1903 trust will be determinative of *Home Trust Company* v. *Bowers* and *Home Trust Company* v. *Edwards* now pending before the United States District Court for the Southern District of New York in which the writer of this brief is the attorney for the taxpayer. Those cases, like the case at bar, are suits against Collectors of Internal Revenue to recover moneys collected by them as a Federal estate tax by reason of the inclusion in the taxable estate of a decedent of the value at the date of his death of property transferred by him under a revocable trust made prior to the passage of the first Federal estate tax act in 1916. The trusts involved in the *Home Trust Company* cases were created in 1911, and they provided (like the 1903 trust in the case at bar) for the payment of the income to the donor during his life and for payment of the income and corpus to certain named persons after the donor's death. The amount of the tax in suit in the *Home Trust Company* cases is $1,165,625. The statute involved in the *Home Trust Company* cases is 402 (c) of the Revenue Act of 1918 (40 Stat. 1097) which is identical with Section 402 (c) of the Revenue Act of 1921 (42 Stat. 278) involved herein.

The material facts relating to the 1903 trust in the case at bar, as stated in the Declaration and admitted by the Collector's demurrer, are as follows:

In 1903 Mr. Bartlett (hereinafter referred to as the decedent) executed and delivered an indenture to The Northern Trust Company of Chicago, as Trustee, conveying 360 shares of stock of Illinois Central Railroad Company in trust (R. 48, 49). Under the terms of the indenture the Trustee was directed to pay the income to the decedent during his lifetime (R. 48). Upon decedent's death the

Trustee was directed to transfer the trust property to the decedent's daughter, one-half if and when she attained the age of thirty years and the other half if and when she attained the age of thirty-five years. If the daughter died before receiving all of the stock the Trustee was directed to transfer it to the appointees or, in default of appointment, the heirs at law of the daughter (R. 48). The Trustee was given the power to sell the trust property and invest the proceeds in such other dividend-bearing or interest-bearing securities as it should deem best and to hold and apply such property to the same uses as the original prop erty (R. 48). The settlor reserved the power to revoke the trust (R. 48).

The decedent died on May 30, 1922, a resident of the State of Illinois (R. 1). The Northern Trust Company was appointed executor under his will (R. 1, 2). In accordance with the regulations of the Federal tax officials then in force, the executor filed a return for estate tax purposes in which it included as a part of the gross estate of the decedent the sum of $44,194.50 being the value at the date of the death of the decedent of the property of the 1903 trust (R. 49). The Federal estate tax resulting from inclusion of the trust property in decedent's gross estate amounted to $7,955.04 (R. 49). The tax was formally assessed by the Federal tax officials, was paid by the executor, and a claim for its refund denied by the Commissioner of Internal Revenue (R. 14, 49).

The executor then sued the Collector to whom the tax had been paid, in the United States District Court for the Northern District of Illinois, Eastern Division, to recover taxes including the tax of $7,955.04 on the ground that Section 402 (c) of the Revenue Act of 1921, under which

the tax was imposed, was unconstitutional and void (R. 16, 49). The Collector demurred to the Declaration of the executor which alleged the facts above set out (R. 57, 59). The District Court held for the executor and entered judgment in its favor (R. 61). The Circuit Court of Appeals for the Seventh Circuit affirmed this decision on the ground that Section 402 (c) was unconstitutional and void (R. 66; 24 Fed. (2d) 91 (1927)). The case is before this Court following the granting of a petition of the Collector for a Writ of Certiorari to the Circuit Court of Appeals for the Seventh Circuit on April 23, 1928 (R. 70; 72 L. Ed. 499).

The Statute.

The relevant provisions of the Revenue Act of 1921 are as follows (42 Stat. 227, 277):

> "Section 401. That, in lieu of the tax imposed by Title IV of the Revenue Act of 1918, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or non-resident of the United States: [Here are listed the applicable rates.] • • •
>
> "Section 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated • • •
>
> "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a

trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death **(whether such transfer or trust is made or created before or after the passage of this Act)**, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

"Section 403. That for the purpose of the tax the value of the net estate shall be determined—[by deducting from the gross estate the items provided in this section]."

Position of *Amicus Curiae*

We maintain, first, that even if Congress could constitutionally have taxed revocable trusts created and revocable transfers made prior to the passage of the first Federal estate tax act in 1916, it did not do so in the Revenue Act of 1921. Since the retroactive clause in the statute has been held by this Court to be unconstitutional, it falls entirely. Inasmuch as there is no separate section or provision of the statute dealing with revocable trusts as distinguished from irrevocable trusts, the Act cannot be applied to revocable trusts while irrevocable trusts are exempted from its operation, without adding to the statute a limitation not now in it. In order to save the constitutionality of the remainder of the Act,—if it is constitutional—it is necessary under the settled rule established in previous decisions of

this Court, to elide the retroactive clause, i. e., to read the statute as if that clause were omitted. When this is done, the statute becomes inapplicable **as a matter of construction** to trusts created and transfers made prior to its passage, this Court having ruled in other cases that the statute is not to be given a retrospective operation unless this is expressly required by its language. And if the statute be not given a retrospective effect, it cannot apply to the 1903 trust, for there can be no doubt that the transfer under this trust occurred in 1903 and not later. The retention by the settlor of a power of revocation, unexercised, cannot, on reason and under the authorities, prevent the taking effect of the transfer. It is at most merely a condition subsequent which would make possible a retransfer.

We maintain, secondly, that even under a statute differently worded, the 1903 trust cannot constitutionally be included in the settlor's gross estate for tax purposes on his death in 1922, inasmuch as it was created in 1903 before any Federal estate tax law had been enacted. We contend that its inclusion in the gross estate of the decedent and the imposition upon that estate of a tax based upon the value in 1922 of property transferred nearly twenty years previously is an arbitrary classification and the taking of property without due process of law in violation of the Fifth Amendment. We also contend that to measure the tax—a so-called excise tax—by the inclusion in the gross estate (at its value at the date of the decedent's death) of property transferred many years previously is not to impose an excise tax but an unapportioned direct tax, which is unconstitutional.

ARGUMENT.

I.

Even if Congress could constitutionally have taxed revocable trusts created and revocable transfers made prior to the passage of the first Federal estate tax act in 1916, it did not do so in the Revenue Act of 1921.

(a) **The retroactive clause of Section 402 (c) has been held unconstitutional.**

The first Federal estate tax act was the 1916 Act. It has no express retroactive clause. It is identical with the 1921 Act here under discussion, except for the retroactive clause. This Court held that, in the absence of an express retroactive clause, the 1916 Act does not apply to trusts and transfers in contemplation of death or intended to take effect in possession or enjoyment at or after death, made or created **prior to its passage.**

> *Shwab* v. *Doyle*, 258 U. S. 529 (1922);
> *Union Trust Co.* v. *Wardell*, 258 U. S. 537 (1922);
> *Levy* v. *Wardell*, 258 U. S. 542 (1922).

The 1918 Act contains a clause expressly retroactive. It requires the inclusion in the taxable estate of every decedent dying after the passage of the Act of all property transferred by the decedent during his lifetime "whether such transfer or trust is made or created before or after the passage of this Act".

In *Nichols* v. *Coolidge*, 274 U. S. 531 (1927), this Court held the retroactive clause unconstitutional, saying at page 542:

> "And we must conclude that §402 (c) of the statute here under consideration, in so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent **prior to its passage** merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation."

Section 402 (c) of the 1921 Act, here under discussion, is identical with Section 402 (c) of the 1918 Act. Under the decision in *Nichols* v. *Coolidge*, therefore, the retroactive clause in Section 402 (c) of the 1921 Act is unconstitutional and void.

In *Nichols* v. *Coolidge*, this Court expressly held open the question of whether Section 402 (c) is constitutional as applied to trusts created and transfers made **after** the passage of the Statute, saying in its opinion at page 543:

> "Whether or how far the challenged provision is valid in respect of transfers made subsequent to the enactment, we need not now consider."

If the remainder of Section 402 (c) of the 1921 Act, applying to trusts created and transfers made **after** the passage of the first Federal estate tax act, is to be upheld, only two possible courses are open to this Court:

(1) The Court might conceivably introduce a modification in the retroactive clause which would limit the scope of the Section to revocable transfers. But, as will now be pointed out, this Court has repeatedly refused to exercise such a legislative power and, in effect, to amend an Act of Congress.

(2) The retroactive clause might be elided and the Statute read as if the retroactive clause were eliminated. If this were done the Statute would become like the 1916 Act, which, as above stated, has been held by this Court to apply only to trusts created and transfers made **after** 1916. The 1903 trust would not then be included in the taxable estate.

(b) **If modifications or limitations must be inserted or implied in an unconstitutional clause in an Act of Congress in order to avoid the fatally broad effect of the language of the clause, the entire Act, or the section containing the clause, must be held void; but if the elision of the clause will leave a consistent and workable Act, the remainder of the Act may be held valid.**

When an Act of Congress has been held unconstitutional in part, the remainder cannot be upheld unless it is embodied in a "separate section or provision" which will be workable despite the elision of the unconstitutional provision.

This is illustrated by the case of *Hill* v. *Wallace*, 259 U. S. 44 (1922). This Court there held that Section 4 of the Future Trading Act of 1921, imposing a tax per bushel on certain contracts for the sale of grain for future delivery, was unconstitutional. The question then arose as to whether other sections in the statute were so distinct from Section 4 that they could be upheld under a provision in the Act to the effect that "if any provision of this Act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby". The Court held

these other sections of the statute invalid, stating, at page 71:

> "undoubtedly such a provision [the saving provision just quoted] furnishes assurance to courts that they may properly sustain **separate sections or provisions** of a partly valid act without hesitation or doubt as to whether they would have been adopted, even if the legislature had been advised of the invalidity of part. But it does not give the court power to amend the act."

In the Revenue Act of 1921 there is no "separate section or provision" providing for taxation of revocable transfers made prior to the passage of the Act. Under the statute, all transfers made prior to the passage of the Act, whether revocable or irrevocable, are placed in one class and are included under the general language "whether such transfer or trust is made or created before or after the passage of this Act." Nowhere in the statute is there a separate classification of revocable and irrevocable transfers.

In order for the Court to uphold the tax on revocable transfers made prior to the passage of the Act, it would be necessary to insert or imply a limitation in the retroactive clause. This the Court will not do.

The latest pronouncement of this Court to that effect is in the case of *Yu Cong Eng* v. *Trinidad, Collector*, 271 U. S. 500 (1926). It there appeared that the Philippine Legislature had passed an Act known as the Chinese Bookkeeping Act. This Act provided:

> "It shall be unlawful for any person, company, partnership or corporation engaged in commerce, industry or any other activity for the purpose of profit in the Philippine Islands, in according with

> existing law, to keep its account books in any language other than English, Spanish, or any local dialect."

The Government admitted that the Act, if literally interpreted to make it unlawful to keep account books in any language other than English, Spanish, or local dialect, probably would be unconstitutional. The Government, therefore, contended that the Act, in view of the history of the legislation, should be interpreted to require only the keeping of such books as were necessary in order to facilitate Government inspection for tax purposes, in English, Spanish or a local dialect. The Court held that, even if the construction sought by the Government would make the Act constitutional, the Act could not be so construed.

At page 518, the Court said:

> "The main objection to the construction given to the Act by the court below [the construction sought by the Government] is that, in making the Act indefinitely mandatory instead of broadly prohibitory, it creates a restriction upon its operation to make it valid that is not in any way suggested by its language. In several cases this Court has pointed out that such strained construction, in order to make a law conform to a constitutional limitation, can not be sustained.
>
> In *United States* v. *Reese*, 92 U. S. 214, the question for decision arose on a demurrer to an indictment against inspectors of municipal election for refusing to receive and count the vote of a colored man. The power of Congress to forbid such an act was confined under the Fifteenth Amendment to a refusal to receive such a vote from a colored man on account of his race, color or previous condition of servitude, but the section under which the indictment

was brought did not specifically confine the offense to a refusal for such a reason or to such discrimination, although in previous sections of the Act there was a general purpose disclosed in the Act to enforce the Fifteenth Amendment. The demurrer was sustained on the ground that the section was invalid.

Chief Justice Waite, in delivering the opinion of the Court, said, at p. 221:

'We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question then to be determined is whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.

'It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to

> some extent, substitute the judicial for the legislative department of the government.'
>
> And again the Chief Justice said:
>
> 'To limit this statute in the manner now asked for would be to make a new law, not to enforce the old one. This is no part of our duty.'
>
> The same principle was laid down, and this language approved by this Court, in the *Trade Mark Cases*, 100 U. S. 82, in which, to save the validity of a general statute providing for trade marks, the Court was asked to construe the statute to apply only to trade marks in interstate commerce."

Another case cited by the Court is *Butts* v. *Merchants Transportation Co.*, 230 U. S. 126 (1913), in which the plaintiff brought a suit under the Federal Civil Rights Act of 1875 to recover damages for having been refused accommodations by a public carrier. The Civil Rights statute prohibited certain acts "within the jurisdiction of the United States." This clause had previously been held unconstitutional as applied to acts which took place in a state. The question then arose as to whether the clause could be upheld by limiting its application to acts which took place upon the high seas and in the District of Columbia and Federal territories. The Court held that, even though Congress could have constitutionally made the Act apply to acts upon the high seas and in the District of Columbia and Federal territories, it was impossible so to limit the statute.

The Court stated, at page 138:

> "Here it is not possible to separate that which is constitutional from that which is not. Both are dependent upon the same general words, 'within the jurisdiction of the United States,' which alone indicate where the sections are to be operative."

And at page 135, the Court stated:

> "So here, to give to the sections in question the effect suggested it would be necessary to reject or strike out the general words 'within the jurisdiction of the United States,' whereby Congress intended to declare and define in what places the sections should be operative, and to insert other and new words restricting their operation to American vessels upon the high seas and to the District of Columbia and the Territories. To do this would be to introduce a limitation where Congress intended none and thereby to make a new penal statute, which, of course, we may not do."

In *Baldwin* v. *Franks*, 120 U. S. 678 (1887), the rule was stated as follows by this Court at page 685:

> "In support of this argument reliance is had on the well settled rule that a statute may be in part constitutional and in part unconstitutional, and that under some circumstances the part which is constitutional will be enforced, and only that which is unconstitutional rejected. To give effect to this rule, however, the parts—that which is constitutional and that which is unconstitutional—must be capable of separation, so that each may be read by itself. This statute * * * provides in general terms for the punishment of all who conspire for the purpose of depriving any person, or any class of persons, of the equal protection of the laws, or of equal privileges or immunities under the laws. A single provision, which makes up the whole section, embraces those who conspire against citizens as well as those who conspire against aliens. * * * The limitation which is sought must be made, if at all, by construction, not by separation. This, it has often been decided, is not enough."

The same rule has been forcefully stated by this Court in the following cases:

The Employers' Liability Cases, 207 U. S. 463, 500 (1908);

Illinois Central R. R. v. *McKendree*, 203 U. S. 514, 529 (1906).

The Collector in the case at bar endeavors to have this Court do exactly the thing which it has many times condemned and refused to do, as shown by the cases just discussed. The Collector would have this Court insert in the retroactive clause some limitation or modification which would allow the taxation of revocable transfers and trusts made or created prior to 1916, while exempting irrevocable transfers and trusts so made.

But in Section 402 (c) of the 1921 Act, Congress makes no distinction between revocable and irrevocable transfers created prior to 1916. The retroactive clause speaks only of transfers or trusts "intended to take effect in possession or enjoyment at or after death," "whether such transfer or trust is made or created before or after the passage of this Act." To uphold the tax in respect of revocable trusts while exempting irrevocable trusts would be to make a distinction and create a classification which Congress did not make. It would be to separate transfers which are not even separately mentioned in the Act. It would be not an interpretation of the Act, but an act of legislation by this Court.

As showing, further, that Congress in the Act of 1921 did not intend separately to classify revocable and irrevocable transfers made prior to the passage of the Act, it should be noted that in the Revenue Act of 1924, Congress for the first time did separately classify revocable transfers.

In addition to the section which corresponds to Section 402 (c) of the 1921 Act, the following section appears in the 1924 Act as Section 302 [43 Stat. 304]:

> "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property * * *
>
> (d) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke,"

It has often been decided by this Court that when the later of two revenue acts expressly taxes a given class for the first time, the earlier act will be interpreted not to tax that class. The later act is regarded as an addition to, and not a clarification of, the earlier act. *Shwab* v. *Doyle*, 258 U. S. 529, 536 (1922).

Applying the reasoning of these cases to the point now under discussion, the express **separate classification** for the first time of revocable and irrevocable trusts made by the 1924 Act is corroborative of the otherwise indubitable fact that no such separate classification was made or intended by the 1921 Act.

(c) **In order to save the remainder of Section 402 (c), the retroactive clause must be elided.**

We have pointed out above that it is not possible under the decisions of this Court to modify the retroactive clause of Section 402 (c) and apply it only to revocable transfers made prior to the passage of the Act.

If Section 402 (c) is to be sustained as applied to transfers made after the passage of the Act, it is necessary to elide the retroactive clause: "whether such transfer or trust is made or created before or after the passage of this Act". This method of separating the void from the valid is the only means available, under the wording and construction of the statute and the decisions discussed above, of saving the remainder of the Section.

The Circuit Court of Appeals for the 6th Circuit, in *Roberts* v. *Atlantic Oil Producing Co.*, 295 Fed. 16 (1924), (certiorari denied, 265 U. S. 582), in an instructive opinion which reviews the cases, points out that the elision of the objectionable words is the sole and necessary method of sustaining, in its valid portions, a partially invalid statute. The Court said (p. 18):

> "From a review of all the Supreme Court decisions, we think it may safely be said * * * that if we find that a mere elision of those words, or even sections, which give an unconstitutional effect, will leave a consistent and workable act, this remainder will be held valid; while if * * * modifications or limitations must be inserted or understood, to avoid the fatally broad effect of the statutory language, the whole act must fail. In other words, we may strike out the excess, but may not add a limitation."

Since Section 402 (c) does not separately classify **revocable** trusts made prior to the statute on the one hand, and **irrevocable** transfers made prior to the statute on the other hand, and since Section 402 (c) has been held by this Court to be unconstitutional as applied to irrevocable transfers made prior to the enactment of the statute, it is submitted that this Court should not, under the decisions,

uphold the tax on the 1903 trust in the case at bar. The retroactive clause must be elided. We shall now point out that when this is done, the Act will be construed not to include the 1903 trust.

(d) **With the retroactive clause of Section 402 (c) of the 1921 Act elided, the section becomes inapplicable as a matter of construction to trusts, revocable or irrevocable, created prior to the passage of the first Federal estate tax act, and therefore inapplicable to the 1903 trust.**

When the retroactive clause is elided from the statute, the most that the Collector can claim is that the Federal estate tax may be levied in respect of trusts created and transfers made **after** the passage of the first Federal estate tax act in 1916. This follows from the decisions in *Shwab* v. *Doyle*, 258 U. S. 529 (1922); *Union Trust Co.* v. *Wardell*, 258 U. S. 537 (1922); *Levy* v. *Wardell*, 258 U. S. 542 (1922); in all of which this Court held that the 1916 Act, which was like the 1921 Act except that there was no retroactive clause, was to be construed to apply only to transfers and trusts made **after** the passage of the act. This Court said in *Shwab* v. *Doyle*, at page 537:

> "And this, we repeat, is in accord with principle and authority. It is the proclamation of both that a statute should not be given a retrospective operation unless its words make that imperative and this cannot be said of the words of the Act of September 8, 1916."

If the statute be not given a retrospective effect, it can not apply to the 1903 trust, for there can be no doubt that the transfer under this trust occurred in 1903 and not later. That is settled by the authorities. We do not cite them

here because they are fully set forth under Point II of this brief (pages 24-33).

To summarize this point:

If there were in the Statute two retroactive clauses, one purporting to apply to irrevocable trusts and one purporting to apply to revocable trusts, one might argue that the former was void, and still argue that the latter was valid despite Nichols v. Coolidge. But there are not two retroactive clauses. There is but one. The same words purport to apply to ALL trusts. The self-same words cannot be held sometimes valid and sometimes invalid. They have been held invalid by this Court in a case involving an irrevocable trust. They are invalid then always in the 1921 Act. They are null and void and they are to be elided from the Statute and without them the Statute becomes like the Statute of 1916, which has been held to apply only to trusts created after the passage of the Act. The 1903 trust, which was created before the passage of the first Federal estate tax act, was therefore wrongly included in the settlor's taxable estate.

II.

The 1903 trust cannot constitutionally be included in the taxable estate of the decedent.

In the preceding portion of this brief we have shown that, even if the tax in respect of the 1903 trust could constitutionally be laid, that has not been done in the 1921 Act. We further maintain that, even if the statute were so drawn as separately to classify revocable and irrevocable trusts

(which it is not), the tax in respect of the 1903 trust would nevertheless be an unconstitutional exaction. The remainder of this brief is devoted to a statement of the reasons and authorities which support this conclusion.

(a) The decision of this Court in Nichols v. Coolidge, 274 U. S. 531 (1927), is determinative of the case at bar.

In *Nichols* v. *Coolidge* it appeared that the decedent and her husband had executed and delivered to trustees a deed of trust in 1907. The trustees were directed to pay the income from the trust property to the settlors, then to the survivor, and after the death of the survivor to distribute the corpus among the settlor's children or their representatives. The trustees were authorized to sell the property and to make and change investments. In 1917 the settlors assigned to the children their entire interest in the property. Upon the death of the survivor the Commissioner of Internal Revenue held that under Section 402 (c) of the Revenue Act of 1918, the trust property transferred in 1907, at its value on the date of the death of the survivor, must be included in her taxable estate. Accordingly, a tax was assessed on her estate including the trust property valued at the date of the survivor's death, and the executors of the survivor sued to recover the amount of tax paid by reason of the inclusion of the trust property in her taxable estate. Section 402 (c) of the 1918 Act is identical with Section 402 (c) of the 1921 Act.

This Court held for the executors on the ground that, since the trust was created prior to the passage of the Act, the trust property could not constitutionally be included in the taxable estate. The Court pointed out the whimsical and burdensome character of the tax in the following language at page 542:

"Property of small value transferred before death may have become immensely valuable, and the estate tax, swollen by this, may leave nothing for distribution. Real estate transferred years ago, when of small value, may be worth an enormous sum at the death. If the deceased leaves no estate there can be no tax; if, on the other hand, he leaves ten dollars both that and the real estate become liable. Different estates must bear disproportionate burdens determined by what the deceased did one or twenty years before he died. See Frew *v.* Bowers, 12 Fed. (2d) 625. * * * And we must conclude that §402 (c) of the statute here under consideration, in so far as it requires that there shall be included in the gross estate the value of property **transferred by a decedent prior to its passage** merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation."

The presence of a power of revocation in the 1903 trust deed in the case at bar, is the only fact which can be relied upon by the Collector to distinguish the case at bar, so far as the 1903 trust is concerned, from *Nichols* v. *Coolidge*. The presence of this power of revocation cannot destroy the fact that the trust property was **transferred prior to the passage** of any Federal estate tax act. Within the decision of this Court in *Nichols* v. *Coolidge*, therefore, the transfer under the 1903 trust deed was made, with respect to the passage of a Federal estate tax act, "**by a decedent prior to its passage**".

It is universally held that the existence of a power to revoke does not affect the efficacy or impair the legal effect of a transfer.

Among the many cases to this effect are:

People v. *The Northern Trust Co.*, 289 Ill. 475, 124 N. E. 662 (1919);

Dolan's Estate, 279 Pa. St. 582 (1924);

Stone v. *Hackett*, 12 Gray (Mass.) 227 (1858);

Jones v. *Clifton*, 101 U. S. 225 (1879);

Frick v. *Lewellyn*, 298 Fed. 803 (Dist. Ct. W. D. Pa. 1924), aff'd 268 U. S. 238 (1925);

Stark v. *United States*, 24 Fed. (2nd) 237 (Dist. Ct. S. D. Ohio, W. D. 1927);

Hill v. *Nichols*, 18 Fed. (2nd) 139 (Dist. Ct. D. Mass., 1927);

Reinecke v. *The Northern Trust Co.*, 24 Fed. (2nd) 91 (C. C. A. 7th Cir. 1927);

The Farmers' Loan and Trust Co. v. *Bowers*, decided by C. C. A. 2nd Cir., Nov. 12, 1928, and not yet reported.

The legal effect of the 1903 trust is, of course, governed by local law. The law of Illinois is settled to the effect that the reservation by a settlor of a power of revocation does not prevent an effective transfer on the date of the execution and delivery of a deed of trust. In *People* v. *The Northern Trust Co.*, 289 Ill. 475, 124 N. E. 662 (1919), the Illinois Court had under consideration the question of whether property transferred *inter vivos* prior to the passage of the tax statute by a settlor who retained a power of revocation could be included in the settlor's taxable estate as a trust "intended to take effect in possession or enjoyment" at or after the settlor's death. The Court held that the trust property should not be so taxed and said at page 481:

"This character of deed, with such a power of revocation, has long been recognized by our law as a proper mode of an ancestor deeding his property to his children and of protecting them in the use and enjoyment of the same. All well-skilled and far-seeing lawyers, advising for the benefit of their clients, usually suggest the insertion of such a clause of revocation, and no court, so far as we know, has ever declared that such a deed is testamentary in character, or is to be held to take effect only after death, by reason, alone, of such a clause of revocation. In fact it is not possible for such a clause to have such effect. As a matter of fact, such a deed takes effect at once and continues in full force and effect until actually revoked. If revoked, it can only be revoked during the life of the grantor, and if he does not call into effect such power of revocation during his lifetime it continues in full force and effect forever after his death. If he revokes the deed under such a power the deed becomes a nullity and the title will be reinvested in the settlor by deed of reconveyance by the trustee."

The rule is the same in other states. In *Dolan's Estate*, 279 Pa. St. 582 (1924), the Pennsylvania Supreme Court had under consideration the same question as that in the *Northern Trust Company* case and held that the property transferred in trust could not be included in the settlor's taxable estate since the transfer was effective at the date of execution and delivery of the trust deed. The Court said at page 589:

"The estate in the children was fixed and definite. The annexation of the power of revocation does not affect the grantee's power of enjoyment or prevent the sale of the property privately or judicially,

though the grantee takes the estate with the possibility of its being divested by the happening of an uncertain event, to wit, the exercise of the power of revocation. Through the exercise of that right reserved, the property may be recalled. But the right to revoke, unexercised, is a dead thing. Its presence in a deed does not alter the character of the instrument or estate granted; to all intents and purposes, title and possession pass just as effectively as any deed or grant could make it, continuing in that state so long as the power of revocation lies dormant.

"An attempt has been made to liken the present deed to that in Matter of Bostwick, 160 N. Y. 489; 55 N. E. 208. The facts in the two cases are not similar. If they were, and the decision had the effect claimed by appellant, we would not hesitate to restate as the law that which this court has always recognized, to wit, the power of revocation in a deed is equivalent to the power of appointment; neither prevents the passing of title or the complete enjoyment of the thing granted. * * *

"How, then, could the extinguishment of the power to revoke the deed of trust by the death of Mrs. Dolan,—that is all death accomplished,—work a transfer of property? The right of revocation, standing alone, is not tantamount to a property right in the settlor; it possesses none of the attributes of property. Mrs. Dolan did everything possible in 1908 to divest herself of the specific property. When she died in 1920 there was nothing for her, the law, or any one to do to complete the act. Revocation is neither an estate nor property, and cannot pass at death."

In *Stone* v. *Hackett*, 12 Gray 227 (1858), the Massachusetts Supreme Judicial Court stated at page 232:

> "A power of revocation is perfectly consistent with the creation of a valid trust. It does not in any degree affect the legal title to the property. That passes to the donee and remains vested for the purposes of the trust, notwithstanding the existence of a right to revoke it."

This Court has also recognized that a power of revocation does not prevent a transfer taking effect at the time of execution of a trust deed. In the leading case of *Jones* v. *Clifton*, 101 U. S. 225 (1879), the Court held that although a deed of trust contained a power of revocation, the ownership of the property which was the subject of the trust passed to the transferee and that the property could not be attached by the donors' creditors. At page 229 the Court stated:

> "The powers of revocation and appointment to other uses reserved to the husband in the deeds in question do not impair their validity or their efficiency in transferring the estate to the wife, to be held by her until such revocation or appointment be made. Indeed, such reservations are usual in family settlements, and are intended 'to meet the ever-varying interests of family connections'. *Riggs* v. *Murray*, 2 Johns. (N. Y.) Ch. 565. So frequent is the necessity of a change in the uses of property thus settled, arising from the altered condition of the family, the addition or death of members, new occupations or positions in life, and a variety of other causes which will readily occur to every one, that the absence of a power of revocation and of appointment to other uses in a deed of family settlement has often been considered a badge of fraud, and, except when made solely to guard against the extravagance and imprudence of the settlor, such settlements have in many instances been annulled on that ground. * * * The

> title to the land and policies passed by the deeds; a power only was reserved. That power is not an interest in the property which can be transferred to another, or sold on execution, or devised by will."

The lower federal courts, following *Jones* v. *Clifton*, have reached the same conclusion. Thus in *Frick* v. *Lewellyn*, 298 Fed. 803 (Dist. Ct. W. D. Pa. 1924), affirmed 268 U. S. 238 (1925), the Court said at page 810:

> "And, finally, I am of opinion that in the three policies in which the assured reserved a right to revoke the assignments to his wife and daughter, but never did so, the rights of the assignees were vested and absolute; that those rights vested immediately under the assignment, subject to a limitation, not a conditional estate, vesting at the time of death, but an estate which vested at once, subject to be divested by the happening of an uncertain future event. As that event did not occur, there was no divestiture."

A similar question was presented in *Stark* v. *United States*, 24 Fed. (2d) 237 (Dist. Ct. S. D. Ohio, W. D. 1927) where the Court said at page 238:

> "It is contended that by reason of the reservation to the settlor of full power of modification and ratification, and of full control over management of the trust as well as of the benefit of all income for life, no transfer was actually made, in substance and effect, but the agreement constituted the so-called trustee as practically nothing but a custodian or agent for the management of such portion of the decedent's estate. This is but to deny the fact of transfer and existing trust, for the reason that it was within the settlor's power to undo what had been done. • • • We are also of the opinion that the retention of a

> life interest in the income of the securities by the donor, of his control of investments and management of the trust, and of his right to change the trustee, considered either separably or in connection with the power of modification, alteration, and revocation, do not negative or prevent the actual creation of the trust, or the fact that at the death of the donor the property so transferred and conveyed in trust passed under the deed of trust the interests which were created in 1915."

In *Hill* v. *Nichols*, 18 Fed. (2d) 139 (1927), it appeared that the settlor had set up a trust in 1905 which provided that the net income, or as much of it as settlor should direct, was to be paid to the settlor during his life, any balance to be added to the principal. The settlor also reserved the power at any time to revoke the trust. The settlor died after the passage of the 1918 Revenue Act. The Federal tax officials held that under Section 402 (c) of the 1918 Act the value of the trust property at the time of the death of the settlor should be included in the gross estate of the decedent. The executors of the decedent sued to recover the amount of the tax assessed by reason of the inclusion in the gross estate of the value of this trust property. The Court held for the executors on the ground that the tax was so arbitrary and capricious as to be unconstitutional, and stated at page 140:

> "I am willing to accept the argument of the Government that Congress, having the power to tax an estate of a deceased person, may measure the tax by any standard which bears a reasonable relation to the subject and is not arbitrary. • • • But I cannot go with it to the extent of regarding as reasonable a measure which includes the value at time of his

death of property of which the decedent has completely divested himself years before the act imposing the tax was enacted. * * * The effect of the assessment by the defendant, now assailed, is to measure the tax upon the testator's estate, not only by the value in 1920 of property which, prior to 1907, he had conveyed away, but also by approximately $2,700,000 of income which had accrued to the trustees, and which, by virtue of the terms of the trust instrument, became a part of the principal of the trust fund. In none of this property did the testator have any interest, legal or equitable, at the time of his death. Such a standard of measurement is both arbitrary and unreasonable. * * * the fact that the settlor reserved until 1919 the right to receive the income, and also the right to alter or terminate the trust, is not, in my opinion, sufficient to bring this trust within that reasonable relation to the subject of the tax which is necessary in order to render the measure a reasonable one. Frew *v.* Bowers, *supra*.

"The power of revocation has no effect upon the validity of the trust or the rights of the trustee, if the power is never exercised. Stone *v.* Hackett, 12 Gray (Mass.) 227; Jones *v.* Clifton, 101 U. S. 225, 25 L. Ed. 908.

"The power is not an interest in property which can pass by will or intestate laws. Jones *v.* Clifton, *supra*; Dolan's Estate, 279 Pa. 582, 124 A. 176. * * * As stated above, I am unable to distinguish this case, in principle, from Coolidge *v.* Nichols, *supra*, [4 Fed. (2d) 112], and I am compelled to the same conclusions reached in that case."

The Government took no appeal from this decision, although the case involved a very large tax.

In *The Farmers' Loan and Trust Co.* v. *Bowers*, decided by the Circuit Court of Appeals for the 2nd Circuit November 12, 1928, and not yet reported, the Court unanimously held that property transferred in trust prior to the passage of the first Federal estate tax act, the trust in that case being revocable by the donor with the consent of the trustee (who was subject to removal at any time by the donor), could not constitutionally be included in the donor's taxable estate. The Court said in its opinion:

> "A power to revoke is not a property right nor an interest in property. *Jones* v. *Clifton*, 101 U. S. 225; *Hill* v. *Nichols*, 18 Fed. (2nd) 139; *Reinecke* v. *The Northern Trust Co.*, 24 Fed. (2nd) 91; *In re Dolan's Estate*, 279 Pa. St. 582; *Stone* v. *Hackett*, 12 Gray (Mass.) 227. The power of revocation is perfectly consistent with the creation of a valid trust. Title passes to the donee and remains vested for the purpose of the trust even though there be a right to revoke it."

As the Circuit Court of Appeals said in its opinion in the case at bar (24 Fed. (2d), 91, at page 93):

> "The 1903 and 1910 trusts were created many years before there was any statute of the kind here involved, and, under the authority of Jones v. Clifton, 101 U. S. 225, 25 L. Ed. 908, we hold that the title and the possession of the property passed out of the settlor, and that, as the right to revoke was not a property right in him, there was nothing that passed from the settlor, at his death, either to the beneficiaries or the trustees."

The retention of a power of revocation does not make the transfer testamentary in character. There are essen-

tial differences between a testamentary transfer and a revocable transfer made *inter vivos*. A testamentary disposition does not in any sense divest the maker of the will of title to his property. The property remains liable for his debts. If he has real property and marries after making the will his wife acquires dower rights in the property regardless of the fact that the will has been made. If, on the other hand, a transfer has been made *inter vivos*—although a power of revocation is retained—the ownership of the property is passed to the transferees, and apart from statute the property cannot be seized by the donor's creditors. *Jones* v. *Clifton*, 101 U. S. 225 (1879). If the donor subsequently marries, his wife will have no dower rights in real property so transferred. *Stone* v. *Hackett*, 12 Gray (Mass.) 227 (1858).

The power of revocation is not an interest in property. This Court so stated in *Jones* v. *Clifton*, *supra*, p. 230:

> **"The title to the land and policies passed by the deed; a power only was reserved. That power is not an interest in the property which can be transferred to another, or sold on execution, or devised by will."**

The estate taken by the donees is a vested estate although it may be revoked and be divested on a condition subsequent. As the District Court said in *Stark* v. *United States*, 24 Fed. (2nd) 237 (1927), at p. 238:

> **"Estates of the remainderman vest subject only to the power in the donor to divest such estates, which power was never exercised."**

From the cases cited in this point in our brief, the well settled rule appears that the reservation of a power of revocation by the grantor of a deed does not prevent the deed

from taking effect or the property from passing to the grantee, at the date of execution and delivery of the deed. The grantee receives a vested interest subject only to be divested by the exercise of the power of revocation. It follows that the transfer in the case at bar took place at the time the trust deed was executed and delivered in 1903. Any attempt, therefore, to tax this transfer under Section 402 (c) of the 1921 Revenue Act is unconstitutional under the decision of this Court in *Nichols* v. *Coolidge*, *supra*:

> "Section 402 (c) * * * in so far as it requires that there shall be included in the gross estate the value of property **transferred by a decedent prior to its passage** merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation."

When the Court made this declaration, the case of *Jones* v. *Clifton*, *supra*, and the other cases discussed under this point, to the effect that the reservation of a power of revocation in a deed does not prevent the transfer of the property described in the deed, were well recognized and settled law.

Moreover, the same reasoning which applies to a transfer where no power of revocation is retained, applies to the taxation of the transfer in the case at bar. Prior to the passage of the statute the settlor had exercised his privilege of transferring a remainderman's interest in certain property to his daughter. When he did so, there was no Federal tax on the exercise of this privilege. After the passage of the Federal estate tax statute, however, if that statute could constitutionally apply to the case at bar, the settlor's property became subject to a tax on this transfer

of a remainderman's interest to his daughter, whether the power of revocation were exercised or not. If he did not exercise the power of revocation he would be taxed, according to the Collector's contention, under Section 402 (c). If he did exercise the power of revocation there was no way in which he could retransfer the property to his daughter, and retain a life interest, without subjecting his estate to a tax.

In other words, if the Collector's contention is sound, a purpose which the settlor had lawfully accomplished in 1903, and which was not taxable when the act was done, had later to be undone under penalty of paying a tax, and if it were undone it could not be reaccomplished by deed or will without liability to a tax. This is the clearest case of a retroactive tax, an effort to impose an inescapable tax on a past lawful untaxed transaction.

The decedent executed his deed of transfer in 1903. He thereupon actually delivered all of the trust property to the trustee. He retained no control of investments or management of the trust; all such control was lodged in the trustee, free from restraint or interference. The trustee continued at all times to hold the trust property to the uses of the trust. The Government cannot alter the fact that there was an effective transfer. It can make laws within constitutional limit, but it cannot make, or avoid the effect of facts. This transfer made in 1903 is the controlling fact in this case. And a transfer lawfully made in 1903, not taxable at that time, cannot be taxed by Congress in 1921.

The argument of the Collector must come down to this. The settlor **could** have revoked his trust—his failure to do so is to be taxed. But an excise tax—a tax on a privilege—cannot be imposed upon inaction. One cannot be **forced** to

do a given act by a tax on the "privilege" of not doing such an act, unless indeed there be a **duty** to perform the act. But there was no **duty** to revoke this trust. The Collector cannot take the position that the settlor **ought** to have revoked the trust and therefore he is to be taxed whether he revokes it or not. Such a position is the bold assertion of the right to impose a direct tax without apportionment, a power not lodged in the Federal Government.

It is worth noting that **all** of the decisions of the lower Federal courts with respect to revocable trusts sought to be taxed under the retroactive clause of Section 402 (c) of the 1918 and 1921 Acts hold that the retroactive clause cannot constitutionally be applied to such trusts. Those decisions are:

Stark v. *United States*, *supra*, 24 Fed. (2nd) 237 (Dist. Ct. S. D. Ohio, W. D. 1927);

Hall v. *Nichols*, *supra*, 18 Fed. (2nd) 139 (Dist. Ct. D. Mass. 1927);

Reinecke v. *The Northern Trust Co.*, *supra*, 24 Fed. (2nd) 91 (C. C. A. 7th Cir. 1927);

The Farmers' Loan and Trust Co. v. *Bowers*, *supra*, decided by C. C. A. 2nd Cir. Nov. 12, 1928, and not yet reported; reversing the District Court decision reported in 15 Fed. (2nd) 796.

(b) **The reasoning on which Section 402 (c) of the 1921 Act might be sustained as applied to subsequent transfers shows its invalidity as applied to the 1903 transfer.**

In *Nichols* v. *Coolidge*, *supra*, this Court expressly held open the question of the constitutionality of the Act as applied to transfers made **after** its passage, saying (p. 542):

> "Whether or how far the challenged provision is valid in respect of transfers made subsequent to the enactment, we need not now consider".

Since the transfer involved in the case at bar was made long prior to the enactment, the question thus held open by this Court does not now arise; we are therefore not arguing at this time the broad question of the constitutionality of Section 402 (c) as applied to subsequent transfers.

It is significant, however, that in *Nichols* v. *Coolidge*, this Court indicated the reasoning upon which the Act, as to subsequent transfers, might be sustained,—reasoning which cannot by any possibility sustain the tax on the 1903 trust. The Court said (p. 541):

> "Undoubtedly, Congress may require that property subsequently transferred in contemplation of death be treated as part of the estate for purposes of taxation. **This is necessary to prevent evasion and give practical effect to the exercise of admitted power but the right is limited by the necessity.**"

Clearly there could have been no intent to evade the Federal estate tax laws by a transfer effectively made in 1903—13 years before any such law had been enacted. An intent to evade cannot exist under such circumstances. A tax upon such a transfer is a bald effort at a direct tax levied without an apportionment, a mere arbitrary and capricious classification unjustified and unrelieved by any reasonable relation to or assistance in the exercise of constitutional power.

POINT III.

The Saltonstall case and others which may be relied upon by the Government are inapplicable.

(a) In view of the rule of *Hill* v. *Wallace, supra*, page 11, the *Saltonstall* case is not in point.

The decision in *Saltonstall* v. *Saltonstall*, 276 U. S. 260 (1928), is not in point in the light of the principles and authorities discussed in Point I of this brief. In deciding the *Saltonstall* case, this Court was not concerned with the rule of *Hill* v. *Wallace*. The question in the *Saltonstall* case was whether a Massachusetts statute, which had been upheld by the Massachusetts Court as applied to the facts before it, was valid under the Fourteenth Amendment. This Court affirmed the Massachusetts decision. There had not been, as in the case at bar, a previous decision by the Massachusetts Court or any other court holding the statute or (as here) the very clause in question to be unconstitutional. It was therefore not necessary, in order to uphold the tax in that case, for this Court to separate situations which the Legislature had failed to separate or in effect to rewrite the statute, as this Court would be required to do in the case at bar in order separately to classify revocable and irrevocable trusts and to exempt the one while sustaining the tax on the other. In the *Saltonstall* case, it was held that on the facts before the Court, the statute did not run counter to the Fourteenth Amendment; and that was all. In the case at bar, this Court is asked to apply a clause (the retroactive clause) which it has already held in *Nichols* v. *Coolidge* to be null and void, and the Court is asked to do this in the face of the unity and indivisibility of that clause.

This is an entirely different situation from that which came before the Court in the *Saltonstall* case and completely distinguishes that case from the present one. It is submitted that the rule of *Hill* v. *Wallace*, applied in the numerous other decisions cited under Point I of this brief, governs this case and requires a decision in favor of the plaintiff with respect to the 1903 trust.

(b) The *Saltonstall* case is distinguishable from the case at bar in that the tax involved in the *Saltonstall* case was a tax on the privilege of succession, whereas the tax involved in this case is a tax on the privilege of transmission.

The decision of the United States Supreme Court in *Saltonstall* v. *Saltonstall*, 276 U. S. 260 (1928), involved the same trust that was involved in *Hill* v. *Nichols*, *supra*, 18 Fed. 139 (1927). In the *Saltonstall* case this Court held that the Commonwealth of Massachusetts had power to levy an inheritance tax on the receipt of trust property by the beneficiaries at the death of the settlor, whereas in the *Hill* case the District Court denied any power in the Federal Government to subject the transfer to the Federal estate tax.

In *Hill* v. *Nichols*, Judge Brewster said (page 141):

> "The power of revocation has no effect upon the validity of the trust or the rights of the trustee, if the power is never exercised. • • • As stated above, I am unable to distinguish this case, in principle, from *Coolidge* v. *Nichols*, *supra*, [4 F. (2d) 112] and I am compelled to the same conclusions reached in that case."

The different results in the two cases are explained by the difference in the nature of the two statutes. The Fed-

eral estate tax is levied upon the right to **transmit or transfer** while the state inheritance tax is levied upon the right to **receive or succeed** to property. Mr. Justice Stone recognizes this distinction and makes it the basis of his opinion in the *Saltonstall* case (p. 270):

> "In *Nichols* v. *Coolidge* it was held that under the estate tax sections of the Revenue Act of 1919—which tax the privilege of transmission, *Nichols* v. *Coolidge, supra; New York Trust Co.* v. *Eisner*, 256 U. S. 345—property of which a donor had made an outright conveyance several years before the enactment of the statute could not, on his death after its enactment, be included as part of his taxable gross estate at its value at the time of his death. But we are here concerned, not with a tax on the privilege of transmission, not with an attempt to tax a donor's estate for an absolute gift made when no tax was thought of, and to do so at the probably appreciated value which the gift now bears, but with a tax on the privilege of succession, which also may constitutionally be subjected to a tax by the state whether occasioned by death, *Stebbins* v. *Riley, supra*, or effected by deed, *Keeny* v. *New York*, 222 U. S. 525, *Chanler* v. *Kelsey, supra*, *Nickel* v. *Cole, supra*. The present tax is not laid on the donor, but on the beneficiary; • • •."

The necessity of keeping in mind the distinction between a tax upon the right to **receive** and a tax upon the right to **transmit**, the Federal estate tax being of the latter class, is thus stated by Chief Justice White in *Knowlton* v. *Moore*, 178 U. S. 41, at page 77 (1900):

> "Indeed, the confusion which gives rise to both of the constructions of the statute which we have just considered comes from the want of insight point-

> ed out by Hanson in a passage which we have heretofore quoted; that is, **it arises from not keeping in mind the distinction between a tax on the interest to which some person succeeds on a death and a tax on the interest which ceased by reason of the death, the two being different objects of taxation.**"

In *Frick* v. *Lewellyn*, 298 Fed. 803 (District Court, Western District of Pennsylvania, 1924), the Court said with respect to an effort to include in the gross estate life insurance policies which had been assigned by the decedent with a power of revocation retained (pages 810-11):

> "**Estate excise taxes are based on the power to transmit or the transmission from the dead to the living, while legacy or inheritance taxes are based on the transmission or the right to receive the property in question.**"

The case of *Matter of Schmollapp*, 236 N. Y. 278 (1923) is similar in all essential respects to the *Saltonstall* case. Both cases involved a State inheritance tax act. The New York tax, like the Massachusetts tax, is an inheritance tax, as distinguished from an estate tax. Although the inheritance tax (both New York and Massachusetts) is payable in the first instance by the executor, the tax is separately computed with respect to each legacy and trust, and is deductible from and reimbursable by such legacy or trust. [New York Tax Law, §§230, 224; Massachusetts General Laws (1921) c. 65 §7.] Arbitrary classification is avoided in the New York Tax Law as in the Massachusetts Act by according to the executor a right of reimbursement for the tax paid in respect of the trust. The New York tax, as well as the Massachusetts tax, is computed with regard to the amount of the trust and the relationship of the donees to the donor, and it is ultimately paid by the trust. It is a very

different thing, however, to tax finally and without reimbursement the donor's estate in respect of a transfer made many years previously, on an ascending scale, and at the value in 1922 of property transferred in 1903. If the contention of the Collector is sound, the Federal estate tax in a given case might be so large as to exhaust the entire estate of the donor. Under the New York and Massachusetts statutes under construction in *Matter of Schmidlapp* and *Saltonstall* v. *Saltonstall*, the executor's right of reimbursement from the trust makes such a result impossible.

The same trust which was involved in the *Schmidlapp* case was held in *Stark* v. *United States*, *supra*, 24 F. (2nd) 237, not to be taxable under the Federal estate tax law. In that case, Judge Hickenlooper, in the Federal District Court in Ohio, followed *Nichols* v. *Coolidge*, and said at page 238:

> "We are also of the opinion that the retention of a life interest in the income of the securities by the donor, of his control of investments and management of the trust, and of his right to change the trustee, considered either separably or in connection with the power of modification, alteration, and revocation, do not negative or prevent the actual creation of the trust, or the fact that at the death of the donor the property so transferred and conveyed in trust passed under the deed of trust the interests which were created in 1915. *Nichols* v. *Coolidge* **specifically calls attention to the difference between excise taxes upon the right to become beneficially entitled to property and an excise upon the transfer of property by death. The federal estate tax law is of the latter sort**"

Respectfully submitted,

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FILED
NOV 28 1928
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

October Term 1928.

No. 90.

MABEL G. REINECKE, Collector of Internal Revenue for the First District of Illinois,

Petitioner,

against

NORTHERN TRUST COMPANY, as Executor under the Last Will and Testament of A. C. Bartlett, Deceased.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF EDWARD H. BLANC AND RUSSELL L. BRADFORD AS AMICI CURIAE AND ON BEHALF OF THE FARMERS' LOAN AND TRUST COMPANY, TRUSTEE.

EDWARD H. BLANC,
RUSSELL L. BRADFORD,
Amici Curiae.

HENRY C. ELDERT,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1928
No. 90.

MABEL G. REINECKE, Collector of Internal Revenue for the First District of Illinois,

Petitioner,

against

NORTHERN TRUST COMPANY, as Executor under the Last Will and Testament of A. C. Bartlett, Deceased.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF AMICI CURIAE.

This brief by permission of the Court, and with the consent of counsel for the respective parties, is filed by the undersigned as *amici curiae*, and on behalf of The Farmers' Loan and Trust Company, Trustee, plaintiff in an action now pending in the United States Circuit Court of Appeals for the Second Circuit, and on behalf of the same Trust Company, as Trustee and Executor, plaintiff in other cases now pending in the United States District Court for the Southern District of New York, all of which cases may be directly affected by the decision of this Court in the above entitled matter.

The relevant facts in the case at bar are set out in the briefs of the parties and in the opinion of the United States Circuit Court of Appeals for the Seventh Circuit (24 Fed. (2) 91).

The argument of this brief will be addressed mainly to the 1903 and 1910 trusts, with incidental references to the five trusts created in 1919, and will be directed to the questions drawn in issue upon the following points and in the following order:

> 1. A transfer made prior to death is not rendered subject to the Federal Estate Tax merely because of a reserved power of revocation, whether or not made prior to the enactment of the Statute; and
>
> 2. The retroactive provisions of Section 402(c) having been declared in *Nichols* v. *Coolidge* unconstitutional in respect of certain transfers or trusts intended to take effect in possession or enjoyment at or after death, they are unconstitutional as applied to all such transfers or trusts.

The Tax in Suit is a Death Duty.

The Federal Estate Tax Act of 1921, like the Federal Estate Tax Act of 1918, is not a transfer, succession, legacy, or inheritance tax, but an estate tax. It is imposed, not upon the coming into or the right to come into possession of property, nor upon any legacy, right of succession or right of inheritance, but solely upon the transfer of property at death. *New York Trust Company* v. *Eisner*, 256 U. S. 345 (1921); *Greiner* v. *Lewellyn*, 258 U. S. 384 (1922); *Y. M. C. A. of Columbus, Ohio* v. *Davis*, 264 U. S. 47 (1924); *Edwards* v. *Slocum*, 264 U. S. 61 (1924); *Nichols* v. *Coolidge*, 274 U. S. 531 (1927).

As Chief Justice Taft in *Y. M. C. A.* v. *Davis*, 264 U. S. 47, at p. 50, puts it:

> "What was being imposed here was *an excise upon the transfer of an estate upon the death of the owner. It was not a tax upon succession and*

> *receipt of benefits under the law or the will.* It was death duties as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devisees succeeded on death, but the interest which ceased by reason of the death. *Knowlton* v. *Moore*, 178 U. S. 41, 48, 49 * * *". (Italics ours).

Again, this Court through Mr. Justice Holmes in *Edwards* v. *Slocum*, 264 U. S. 61, 62, said of the statute in suit:

> "It taxes, as Hanson, Death Duties, puts it in a passage cited in 178 U. S. 49, 'not the interest to which some person succeeds on a death, *but the interest which ceased* by reason of the death'." (Italics ours).

The above propositions form the premise underlying and expressly recognized in the decisions of this Court in *Nichols* v. *Coolidge*, 274 U. S. 531, and *Shukert* v. *Allen*, 273 U. S. 545, 547, and of the United States Circuit Court of Appeals for the Second Circuit in *Frew* v. *Bowers*, 12 Fed. (2d) 625, 626 (1926), cited with approval by this Court in the *Coolidge* case.

POINT I.

A transfer made prior to death is not rendered subject to the Federal Estate Tax merely because a power of revocation is reserved, whether or not made prior to the enactment of the statute.

The contention of the Government that the transfers in this case are subject to the Federal estate tax because of the reserved power to revoke the trust instrument rests, and must rest, upon one of the following arguments:

(1) That the statute reaches back to impose a tax retroactively upon a transfer made prior to its enactment; or

(2) That the transfer is not itself subject to the tax but that the fund transferred is used only to measure the amount of the tax upon such property as is in fact transferred at death; or

(3) That the transfer while complete at the time of transfer became for some reason testamentary in character because of the reserved power to revoke and that it therefor falls within the statute; or

(4) That while there was a transfer it was incomplete until death because of the reserved power to revoke.

Let us now analyze the above four bases.

(1) The first of them may be eliminated at once because this Court in *Untermeyer* v. *Anderson*, 276 U. S. 440, (1928) has definitely held that an excise may not be imposed upon a transfer complete prior to the enactment of the Act. See also *Nichols* v. *Coolidge*, 274 U. S. 531, and *Blodgett* v. *Holden*, 275 U. S. 142 (1928).

(2) The second is likewise untenable as this Court in *Nichols* v. *Coolidge*, *supra*, has decided. To the same effect is *Frew* v. *Bowers*, 12 Fed. (2d) 625 (C. C. A. 2nd Cir.). A tax upon the transfer of property must be measured by the value of the property so transferred and by no other property. Any other scheme of taxation would be a violation of the Fifth Amendment as arbitrary and capricious, and in effect confiscation and not the exercise of the taxing power of Congress. *Nichols* v. *Coolidge*, *supra*, and see also *Frick* v. *Pennsylvania*, 268 U. S. 473, (1925) and *Knowlton* v. *Moore*, 178 U. S. 41 (1900); and cf. *Llewellyn* v. *Frick*, 268 U. S. 238 (1925).

(3) A power of revocation does not render a transfer testamentary in fact or in character. (See *Schouler on Wills*, 6th Ed., Vol. 1, p. 406). A will does not until death clothe the legatee named therein with any interest in property. It has no effect of any sort until death. In

fact it is not a will until death. Revocability, as Schouler on Wills (above) expresses it, is not the great criterion of testamentary dispositions, but whether a disposition is or is not testamentary is determinable by whether there is a vesting of any interest prior to death. See *Matter of Diez*, 50 N. Y. 88, 93 (1872). A power to revoke is not a property right nor an interest in property. (*Jones* v. *Clifton*, 101 U. S. 225 (1879); *Dolan's Estate*, 279 Pa. St. 582; *Stone* v. *Hackett*, 12 Gray (Mass.) 227 (1858); *Stark* v. *United States*, 24 Fed. (2d) 237 (U. S. D. C. S. D. Ohio); *Hill* v. *Nichols*, 18 Fed. (2d) 139 (U. S. D. C., Mass.); *Reinecke* v. *Northern Trust Company*, 24 Fed. (2d) 91 (C. C. A. 7th Cir.); *Farmers Loan & Trust Co.* v. *Bowers* (decided Nov. 12, 1928, C. C. A. 2nd Cir.—unreported as yet); *People* v. *Northern Trust Co.*, 289 Ill. 475 (1919).) The power not being property or an interest in property does not, and may not, pass at death to anyone. It is not transferable, descendable or alienable, nor may it be willed. It is unique and personal to the person or persons in whom it is lodged.

That a power of revocation does not make a transfer testamentary has been held in the domain of the general law as applied (a) to insurance (*Llewellyn* v. *Frick*, 268 U. S. 238, 298 Fed. 803; *Tyler* v. *Treas. & Rec. Gen.*, 226 Mass. 306; *Matter of Voorhees*, 200 App. Div. (N. Y.) 259 (1922)), and (b) to questions concerning the validity of trusts and the completeness of transfers (*Stone* v. *Hackett*, *supra*; *Kelley* v. *Snow*, 185 Mass. 288 (1904); *Nichols* v. *Emery*, 109 Cal. 323 (1895); *Sims* v. *Brown*, 252 Mo. 58 (1913); *Allen* v. *Hendrick*, 104 Or. 202 (1922); *Richardson* v. *Stephenson*, 193 Wis. 89 (1927); *Lee* v. *Belknap*, 168 Ky. 418—1915), and (c)—except where specifically changed by statute—to attacks by creditors (*Jones* v. *Clifton*, *supra*).

The suggestion was made and argued both in the brief and orally in this Court in *Nichols* v. *Coolidge* that

the trust there in suit was testamentary in character, but this Court brushed aside the suggestion with the statement (p. 540):—

> "But the conveyance by Mrs. Coolidge to trustees was in no proper sense testamentary, and it bears no substantial relationship to the transfer by death. The mere desire to equalize taxation cannot justify a burden on something not within congressional power."

While it is true that in the *Coolidge* case there was no power to revoke reserved to the grantor, nevertheless the Government contended that the transaction was testamentary in character. In the case of *Lewellyn* v. *Frick*, 268 U. S. 238 (1925) this Court evidently found nothing testamentary in the policies of insurance there involved. These policies were made payable to Mrs. Frick and Miss Frick. In some the insured specifically reserved the power to change the beneficiary. In others this right to change the beneficiary was a part of the policy itself. The power to revoke the insurance given did not render the gifts of the policies testamentary in character or in fact.

Nothing testamentary was found by the Court in transfers or trusts which were subject to revocation in the following cases having to do with the statute in suit: *Reinecke* v. *Northern Trust Company*, case in suit; *Hill* v. *Nichols*, supra (same trust as was involved in *Saltonstall* v. *Saltonstall*, 276 U. S. 260 under a Massachusetts succession tax statute); *Stark* v. *United States*, 24 Fed. (2d) 237 (same trust as was involved in *Matter of Schmidlapp*, 236 N. Y. 278). Nor did the Pennsylvania Court find anything testamentary because of the power to revoke in the trusts in *In re Dolan's Estate*, 279 Pa. St. 582 (1924). The United States District Court for the Eastern District of Pennsylvania in *Fidelity Trust Co.* v. *McCaughn*, 17 Fed. (2d) 605 (1926), involving the 1918

Federal Estate Tax Act which is word for word similar to the statute here in suit, held the trust in the Dolan Estate not to be subject to tax, and therefore not to be testamentary in fact or in character. The decisions of the Courts of New York are to the same effect. (*Matter of Masury*, 28 App. Div. 580, aff'd 159 N. Y. 532 (1899); *Matter of Keeney*, 194 N. Y. 281 (1909) (as to three-fourths) aff'd *sub nom Keeney* v. *New York*, 222 U. S. 525; *Matter of Carnegie*, 203 App. Div. 91, aff'd 236 N. Y. 517 (1923); *Matter of Bowers*, 195 App. Div. 548, aff'd 231 N. Y. 613 (1921); *Matter of Miller*, 236 N. Y. 290 (1923). We think that in *Matter of Schmidlapp*, 236 N. Y. 278, decided the same day as *Matter of Miller*, supra, there existed many elements which deprive that case of force as bearing on the present issue.

It has been directly held that a transaction is not testamentary in character merely because of the reservation of a power to revoke. *Sims* v. *Brown*, 252 Mo. 58 (1913); *Nichols* v. *Emery*, 109 Cal. 323 (1895) and *Robb* v. *Washington & Jefferson College*, 103 App. Div. (N. Y.) 327, 348, 353 (1905), aff'd 185 N. Y. 485, 493 (1906).

(4) The fourth hypothesis, namely, that, because of the reservation of the power to revoke, the transfer is incomplete until the moment of death when the power to revoke is annihilated, is, we submit, equally untenable. The proposition itself is a denial of the *fact of transfer*. See *Stark* v. *United States*, 24 Fed. (2d) 237, 238. If the transfer is incomplete there has been no transfer. It is obvious that a revocation must operate upon a transfer that has been made. We take it that this is self-evident. A clear exposition of the principle that the transfer is complete and the trust valid notwithstanding the power of revocation, is set out in the opinion of Mr. Justice Field in the decision in *Jones* v. *Clifton*, supra, where it is said at pp. 229-230:—

> "*The powers of revocation and appointment to other uses reserved to the husband in the deeds*

> *in question do not impair their validity or their efficiency in transferring the estate to the wife*, to be held by her until such revocation or appointment be made. * * * *The title to the land and policies passed by the deeds; a power only was reserved. That power is not an interest in the property which can be transferred to another, or sold on execution, or devised by will.*" (Italics ours).

One of the outstanding cases is *Stone* v. *Hackett*, supra, where the Massachusetts Court said at p. 232:

> "It was suggested by the learned counsel for the widow that the donor never parted with his power or dominion over the property because he retained a right to annul or revoke the trust, *but this seems to us quite immaterial.* A power of revocation is perfectly consistent with the creation of a valid trust. It does not in any degree affect the legal title to the property. *That passes to the donee and remains vested for the purposes of the trust, notwithstanding the existence of a right to revoke it.*" (Italics ours).

And when we come to the domain of death duties and inheritance taxes we find the law settled and definite. This is true under statutes imposing transfer taxes or succession and legacy taxes, and *a fortiori* true where there are estate taxes.

The New York Courts have held that the mere reservation of a power to revoke is immaterial in the determination of whether or not the transfer tax imposed under the New York statute may be applied to transfers made prior to death. *Matter of Masury*, 28 App. Div. 580, aff'd 159 N. Y. 532; *Matter of Keeney*, 194 N. Y. 281 (as to three fourths) aff'd sub nom *Keeney* v. *New York*, 222 U. S. 525; *Matter of Carnegie*, 203 App. Div. 91, aff'd 236 N. Y. 547; *Matter of Votichenko*, C. C. H. N. Y. Tax Service for July 25, 1928; *Matter of Cochrane*, 117 Misc. 18 (1921), aff'd without op. 202 App. Div. (N. Y.) 751;

Matter of Isaac Wing's Estate, 190 N. Y. Supp. 908 (1921), in all of which cases there was an absolute power to revoke. *A fortiori* was the power of revocation held to be immaterial in the determination of the issue presented where the power to revoke was dependent upon the consent of one or more of the trustees. *Matter of Bowers*, 195 App. Div. 548, aff'd 231 N. Y. 613.

In *re Dolan's Estate*, 279 Pa. St. 582, the discussion of the Court is so clear and definite, we think it not inappropriate to quote at length from the opinion (p. 589):

> "The estate in the children was fixed and definite. The *annexation of the power of revocation does not affect the grantee's power of enjoyment or prevent the sale of the property privately or judicially*, though the grantee takes the estate with the possibility of its being divested by the happening of an uncertain event, to wit, the exercise of the power of revocation. Through the exercise of that right reserved the property may be recalled. But the right to revoke, unexercised, is a dead thing. Its presence in a deed does not alter the character of the instrument or estate granted; to all intents and purposes, title and possession pass just as effectively as any deed or grant could make it, continuing in that state so long as the power of revocation lies dormant. * * * *

> *How, then, could the extinguishment of the power to revoke the deed of trust by the death of Mrs. Dolan—that is all death accomplished,—work a transfer of property? The right of revocation, standing alone, is not tantamount to a property right in the settlor; it possesses none of the attributes of property.* Mrs. Dolan did everything possible in 1908 to divest herself of the specific property. When she died in 1920 there was nothing for her, the law, or any one to do to complete the act. *Revocation is neither an estate nor property and cannot pass at death.*"

The decisions of the Illinois Courts are to the same effect. See *People* v. *Northern Trust Co.*, 289 Ill. 475.

Under the statute in suit the lower Federal courts have held transfers not to be subject to tax where there was a power to revoke reserved to the settlor. See decision in case in suit by Circuit Court of Appeal, and *Stark* v. *United States*, 24 Fed. (2d) 237, and *Fidelity Trust Co.* v. *McCaughn*, 17 Fed. (2) 605, 607, where there was an absolute power to revoke. See also *Hill* v. *Nichols*, 18 Fed. (2d) 139, and *Farmers Loan & Trust Co. etc.* v. *Rogers* (decided by C. C. A. 2nd Cir. Nov. 12, 1928—unreported as yet), where the power to revoke could be exercised only with the consent of one or more of the trustees. In the latter case Judge Manton speaking for a unanimous Court in reversing the Court below said in respect of powers of revocation:—

> "A power to revoke is not a property right nor an interest in property. *Jones* v. *Clifton*, 101 U. S. 225; *Hill* v. *Nichols*, 18 Fed. (2d) 139; *Reinecke* v. *Northern Trust Company*, 24 Fed. (2d) 91; *In re Dolan's Estate*, 279 Pa. St. 582; *Stone* v. *Hackett*, 12 Gray (Mass.) 227. The power of revocation is perfectly consistent with the creation of a valid trust. Title passes to the donee and remains vested for the purpose of the trust even though there be a right to revoke it. The power to revoke is not evidence of an intent to postpone the legal enjoyment, existence or effect of that which may perhaps thereafter be brought to an end for the reason that the enjoyment and possession actually passes to the beneficiaries. Until the right to revoke is exercised an estate exists by virtue of the transfer. *People* v. *Northern Trust Co.*, 289 Ill. 475; *In re Dolan's Estate*, *supra*. Such a power is not transferable or descendable nor may it be alienated or passed by a will. It is personal to the holder. *Lewellyn* v. *Frick*, 268 U. S. 238; *Jones* v. *Clifton*, *supra*; *Reinecke* v. *Northern Trust Co.*, *supra*. When in May, 1916, the settlor made his indenture, he transferred his

> title and also all possession and enjoyment. His reserved powers were not conditions of the vesting of the estate, but merely conditional limitations."

We submit, moreover, that if the trust was created and the transfer made prior to the enactment of any Federal Estate Tax Act, as is true of the 1903 and 1910 trusts in suit, the power of revocation has no part in the determination of whether the transfer may be subjected to the Federal estate tax. The sole question in issue in such a case, we submit, is whether the Government is not foreclosed from imposing the tax in suit by the decision of this Court in *Nichols* v. *Coolidge*.

It is clear that the tax may not be sustained if it be imposed upon a transfer completed prior to the enactment of the Act. It is equally clear that it may not be sustained if the tax is not imposed upon the transfer of the property composing the corpus of the 1903 and 1910 trusts here in suit but is imposed upon the estate of A. C. Bartlett measured by those trusts. It is likewise equally true that the mere power of revocation reserved does not render the transfers testamentary in fact or in character. This is indubitably so when we take into consideration the fact that the tax is upon the transfer of property at death, and is not imposed upon transactions already complete merely because—if indeed that be arguable—there may be present some elements which may also be present in testamentary dispositions. It is no less true that the transfer is not rendered incomplete if otherwise complete, merely because of a reserved power to revoke.

In Respect of the Five 1919 Trusts.

We submit that these five trusts are certainly not within the statute. No income was reserved to the grantor in any of the trusts created in 1919. While there

was reserved a limited power to revoke the trusts if, and only if, the consent of a majority of the beneficiaries of the five trusts could be obtained (and in each of the five trusts there was a separate beneficiary), this was not a power of revocation at all but in effect was nothing more than a power to ask permission of the beneficiaries to revoke the same, which permission or consent had to be given by a majority thereof. The settlor so bridled his rights in respect of the trusts that the reins did not rest in his hands but in the hands of the beneficiaries. In other words revocability was a matter ultimately for the act of parties other than the settlor. As no income is reserved and as a power of revocation is immaterial these five trusts are not within the purview of Section 402(c) of the Revenue Act of 1924, under any rule.

POINT II.

The retroactive provisions of Section 402(c) having been declared in Nichols v. Coolidge unconstitutional in respect of certain transfers or trusts intended to take effect in possession or enjoyment at or after death those provisions are unconstitutional as applied to all such transfers or trusts.

Section 401 of the statute imposes the tax. The germane parts of Section 402 provide:—

> "That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wheresoever situated. • • •
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or

> after his death *(whether such transfer or trust is made or created before or after the passage of this Act)*, except in the case of a bona fide sale for a fair consideration in money or money's worth. • • • "

This section has application to all transfers made or trusts created intended to take effect in possession or enjoyment at or after death. There are no classifications or gradations of such transfers or trusts.

The Courts may not, under well settled rules, specifically apply the retroactive provision to some species of such transfers or trusts to the exclusion of others when the language of the statute is general in scope and purpose and not specific. This doctrine is laid down with clarity in *Batts* v. *Merchants Transportation Co.*, 230 U. S. 126 (1913), where this Court expressed the rule in the following language at p. 135:

> "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large."

The decision of this Court in *Nichols* v. *Coolidge*, *supra*, has held that the retroactive provisions of Section 402(c) are unconstitutional when applied to transfers made or trusts created prior to the enactment of any Federal Estate Tax Act even if the transfers or trusts were intended to take effect in possession or enjoyment at or after the death of the settlor. We take it that as the retroactive part of the statute is therefore unconstitutional, it is unconstitutional in respect of its application to *all* trusts or transfers made prior to the enactment of the law.

There is no other section or provision of the statute that may be called into play for the purpose of upholding

a tax upon a past transfer. (See opinion of Sanborn, J., in *Chicago, Milwaukee & St. Paul Ruw. Co.* v. *Westby*, 178 Fed. 619, 629—C. C. A. 8th Cir.—1910; *Baldwin* v. *Franks*, 120 U. S. 678, 685—1887; *Hill* v. *Wallace*, 259 U. S. 44, 70, 71—1922; *United States* v. *Reese*, 92 U. S. 214, 221—1875.)

To construe Section 402(c) of the 1921 Act in the light of the decision of this Court in *Nichols* v. *Coolidge* so as to make it applicable to the case in suit necessarily involves the exclusion of certain kinds of transfers and trusts such as irrevocable trusts from the operation of the statute. The question presented in determining whether a statute is partly enforceable after having been held partly invalid is one "of interpretation and legislative intent". *Dorchy* v. *Kansas*, 264 U. S. 286, 290 (1923). What did Congress intend in enacting Section 402(c) with the retroactive provision? Did it intend the retrospective operation of the section to *apply only* to trusts wherein there was a power of revocation, or does the section apply to all trusts or transfers made prior to the enactment of the law?

The rule of construction, and the doctrine of searching for the intention of the legislative branch of Government must be determined from the language used. If upon striking out the invalid part the remainder may be held valid, and the Court can find that the legislative body intended the valid part to stand, then that will be done. If the intention to legislate as to the remainder cannot be found from the language of the law or its context, then the whole statute falls. *Pollock* v. *Farmers' Loan and Trust Co.*, 158 U. S. 601, 636 (1894); *Baldwin* v. *Franks*, *supra*.

If both a valid part and an invalid part are dependent upon the same words as in *Butts* v. *Merchants Transportation Co.*, *supra*, and *Hill* v. *Wallace*, *supra*, they may not be separated and no part is valid. To render any part

valid the Court must look to other sections or provisions of the law. If there be none then the law is invalid in all its parts. (*Butts* v. *Merchants Transportation Co., supra; Hill* v. *Wallace, supra; United States* v. *Reese, supra; Chicago, Milwaukee & St. Paul Ruy. Co.* v. *Westby, supra*, and see opinion in *Roberts* v. *Atlantic Oil Producing Co.*, 295 Fed. 16 (1924) (certiorari denied 265 U. S. 582).)

If the elision of the invalid provision is necessary to uphold the remainder, the law may not be sustained as to this remainder by the courts adding limitations or new and additional words, or construing the statute as though words not in the statute are to be assumed to be there. (*See Roberts* v. *Atlantic Oil Producing Co., supra; Butts* v. *Merchants Transportation Co., supra*). This rule is clearly expressed in the opinion of Chief Justice Taft in *Hill* v. *Wallace, supra*, at pp. 70-71, where he quotes with approval from the decision of this Court through Chief Justice Waite in *United States* v. *Reese, supra*, (p. 221):

> "'We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. *The proposed effect is not to be obtained by striking out or disregarding words that are in the section, but by inserting those that are not now there.* Each of the sections must stand as a whole, or fall together. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only. * * * *To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one.* This is no part of our duty'."

Again, the Circuit Court of Appeals of the Sixth Circuit in *Roberts* v. *Atlantic Oil Producing Co., supra,* at p. 18 states the doctrine in the following summary:—

> "From a review of all the Supreme Court decisions, we think it may safely be said, * * * that if we find that a mere elision of those words, or even sections, which give an unconstitutional effect, will leave a consistent and workable act, this remainder will be held valid; while if * * * modifications or limitations must be inserted or understood, to avoid the fatally broad effect of the statutory language, the whole act must fail. *In other words, we may strike out the excess, but may not add a limitation.*"

When Congress Wished to Tax Revocable Trusts It Did So by Definite Provision.

The intention of Congress best may be ascertained by looking at subsequent Acts of Congress. The Congress for the first time in the Revenue Act of 1924, effective June 2nd, 1924, indicated an intention to apply the Federal Estate Tax to transfers or trusts wherein there was reserved a power of revocation. Section 302(c) of the Revenue Act of 1924 is the counterpart of Section 402(c) of the Act in suit. But the 1924 Act in Section 302(d) made provision for the taxation of transfers or trusts subject to a power to revoke, a provision not in any of the earlier Acts. That Section provides:—

> "(d) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of

> his death, except in case of a bona fide sale for a fair consideration in money or money's worth."

When the Congress had an intention to single out specifically trusts or transfers subject to revocation it did so. It cannot be presumed that that intention existed until it was expressed. The new provision is to be treated as a new law, and not as a clarification of the old statutes. *Shwab* v. *Doyle*, 258 U. S. 529, 536 (1922), and the cases decided with it. See also *United States* v. *Field*, 255 U. S. 257 (1921).

If the unconstitutional language in Section 402(c) of the statute in suit is stricken from the section then the law may not be construed as retrospective in operation. The Act would be exactly as the 1916 Act was, and that Act was construed by this Court as not retroactive. *Shwab* v. *Doyle, supra; Union Trust Co. of San Francisco* v. *Wardell*, 258 U. S. 537 (1922); *Levy* v. *Wardell*, 258 U. S. 542 (1922); *Knox* v. *McElligott*, 258 U. S. 546 (1922).

We submit that the decision of this Court in *Nichols* v. *Coolidge*, forecloses the case in suit in respect of the 1903 and 1910 trusts. Other than Section 402(c) there is no provision or section of the law applying to past transfers—and this part of the law applying to past transfers has been held unconstitutional in respect of irrevocable trusts and transfers. The Courts may not uphold taxability of past revocable trusts and leave free of the tax past irrevocable trusts when one clause of the law applies to both or all past transfers or trusts. The intention of Congress is reflected in its subsequent Acts, and that intention so expressed subsequently may not be attributed to earlier Acts when it was not expressed. If the unconstitutional part is elided (or stricken out) no past transfers or trusts are amenable to the taxing statute as construed by this Court. The Court will not add words to render the transaction taxable when with-

out the words the transaction is not covered by the net of the provisions of the statute. The Court will not, as we understand the rule, enact or make a law that the Congress has not made.

POINT III.

The decision of the Courts below should be affirmed.

Respectfully submitted,

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